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AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 243

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, PLAINTIFF IN ERROR,

vs.

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 10, 1896.
CERTIORARI AND RETURN FILED OCTOBER 26, 1896.

(16,401.)

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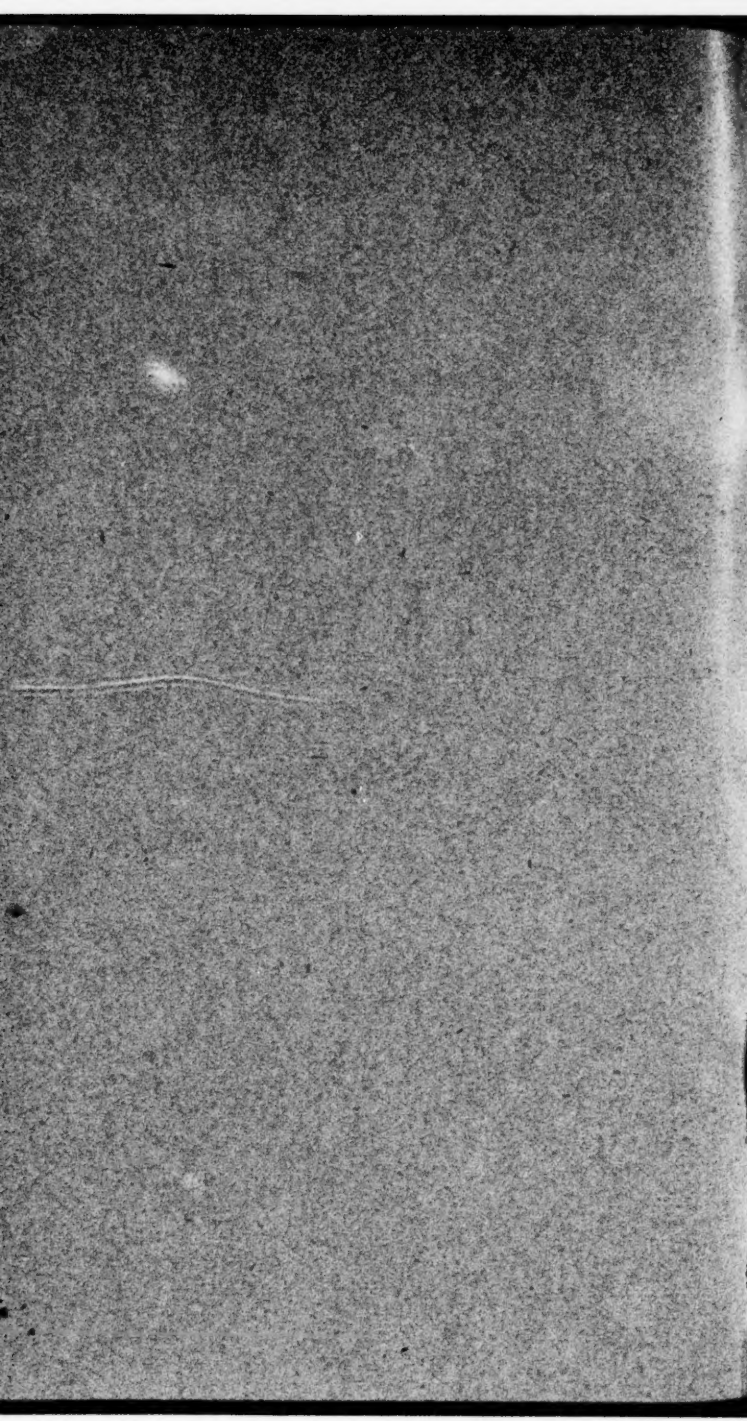

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BLEED.

a In the Supreme Court of the United States, October Term, 1897.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error,
versus
THE PROVIDENT LIFE AND TRUST CO. OF PHILADELPHIA, Defendant in Error.
No. 243.

On writ of certiorari to the United States circuit court of appeals for the sixth circuit.

Stipulation.

In the reprinting of the record certified from the U. S. circuit court of appeals for the sixth circuit, it is stipulated by the parties as follows:

I.

The clerk of the Supreme Court may omit—

(1.) The verification of petition (p. 9) and of answer (p. 13).

(2.) The process and return thereon (pp. 9, 10).

(3.) The amended and supplemental petition (pp. 14, 15), substituting therefor this statement:

"The amended and supplemental petition, setting up coupons maturing during the pendency of the suit, is omitted per stipulation."

(4.) The form of the bonds sued on (pp. 27, 28), substituting therefor this statement:

"Omitted per stipulation, as it is copied in full in the petition, *supra*."

(5.) The order filing the bill of exceptions, writ of error,
b and assignment of errors (p. 36).

(6.) The appeal bond, clerk's certificate, writ of error, orders passing case and submitting case (pp. 45–48), substituting therefor the statement on p. 46 of attached record.

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(7.) Orders extending time for filing a petition for rehearing, the petition for a rehearing, and the order overruling the same (pp. 68–83), substituting therefor this statement:

"A petition for a rehearing was duly filed, which was denied, on May 25th, 1896, without an opinion."

(8.) The clerk's certificate (p. 83).

II.

That the record may be paragraphed, spaced, quotation-marks inserted, and a short descriptive heading inserted at the beginning of the various documents, as appears by the marked copy of the record hereto attached.

THE PROVIDENT LIFE AND TRUST CO. OF PHILADELPHIA,
By THOMAS W. BULLITT, *Counsel.*
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
By ALEX. P. HUMPHREY, *Counsel.*

June 21st, 1897.

c [Endorsed:] No. —. In the United States Supreme Court. County of Mercer, pl'tiff in error, *versus* Provident Life & Trust Co., defendant in error. Stipulation of counsel. Bullitt & Sheild, counsel for plaintiff in error, Fifth and Main Sts., Louisville, Ky.

1 *Transcript of Record.*

Filed in the United States circuit court of appeals for the sixth circuit May 23, 1895.

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal Court hall, in the city of Louisville, on Monday, February 18th, 1895.

Present: Honorable John W. Barr, sitting as circuit judge.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA
vs.
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY. } No. 6225. Petition.

Be it remembered that heretofore, to wit, on the 3rd day of November, 1892, came the plaintiff, by its attorneys, Messrs. Bullitt &

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Shield, and filed in the clerk's office of our said court its petition against the above-named defendant.

The petition above referred to is in the words and figures as follows, to wit:

United States Circuit Court, District of Kentucky.

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Defendant.
} Petition.

The plaintiff, The Provident Life & Trust Company of Philadelphia, states that it is a corporation created, organized and existing under the laws of the State of Pennsylvania; the defendant, The County of Mercer, is a municipal corporation created, organized and existing under the laws of the State of Kentucky, and is a citizen of the said State, and each of said parties has corporate capacity to contract and be contracted with and to sue.

Plaintiff further states that the Louisville Southern Railroad Company is a corporation likewise created, organized and existing under the laws of the State of Kentucky, possessing by its
2 charter the power and authority to construct its railroad, hereinafter mentioned, extending from the city of Louisville to and through the said county of Mercer, as will more fully appear by reference to an act of the legislature of Kentucky, entitled "An act to incorporate the Louisville, Harrodsburg & Virginia Railroad Company," approved March 9th, 1868, and by another act amendatory thereof, entitled "An act to amend an act entitled 'An act to incorporate the Louisville, Harrodsburg & Virginia Railroad Company,' approved March 9th, 1868, and to change the name of said company to that of the Louisville Southern Railroad Company," approved April 28th, 1884, and other acts amendatory of said original act and of said original and amendatory act.

By another act of the said legislature of the State of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, it was provided that the county of Mercer might subscribe to the capital stock of the Louisville Southern Railroad Company as therein provided, and might pay therefor in the negotiable coupon bonds of the said county, payable not more than thirty years after

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date, bearing interest at the rate of not exceeding six per cent. per annum, payable semi-annually, to be payable at a place designated therein; said act providing that whenever application should be made to the judge of the county court of the said county by a petition of twenty-five resident tax-payers therein requesting that the question of subscribing to the capital stock of said railroad company upon the terms and conditions set forth in said petition be submitted to a vote of the legal voters of said county, it should be the duty of the county court to order an election to be held in said county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice of such election to be published in said county in a newspaper published therein for ten days, and to be posted at the court-house door in said county, and at such other public places therein as said judge by order might direct, and that at such election votes should be received "for the railroad subscription" and "against the railroad subscription;" officers of said election to be appointed and to hold the same and make return thereof to the county judge in the manner provided; that as soon as might be after said election the county judge should determine if a majority of the legal votes cast at said election were in favor of such subscription, and if so he should thereupon enter an order subscribing, on behalf of said county of

3 Mercer, to the capital stock of said railroad company in accordance with the terms of the proposition voted on, and he should thereupon cause to be prepared and should execute negotiable coupon bonds of said county, which should be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, the coupons to be signed by the clerk.

Said act further provided that said bonds should not be binding nor valid obligations until the railway of said railway company should have been so completed through said county of Mercer that a train of cars should have passed over the same, at which time said negotiable coupon bonds should be delivered to said railroad company in payment of the subscription of said county, and that the county should thereupon be entitled to receive certificates for the stock subscribed for by it. Said act further provided that the county judge of said county should order that said bonds should be deposited with a trustee or trust company to be held in escrow to deliver to said railroad company when it should become entitled to the same by the construction of its railroad through said county; provided, however, that said trust company or trustee should, before receiving said bonds, give bond with good surety approved by the county

judge for the faithful performance of his or its duty in the premises, and provided, further, that no such subscription should be binding unless said railroad should pass to or through the corporate limits of the town of Harrodsburg. Said act further provided that an annual tax sufficient to pay the interest on said bonds, and the principal when it should become due, should be levied, collected, and paid out by the officers of said county as provided in the case of other county taxes, and that said act should take effect from and after its passage.

Plaintiff further states that pursuant to the provisions of said act the application therein mentioned was, on or about the 18th day of November, 1886, made to the judge of the Mercer county court, by petition of 25 tax-payers resident therein, setting forth the terms and conditions of a proposed subscription by said county to the capital stock of said railroad company, and requesting that the question of such subscription should be submitted to a vote of the legal voters of said county, viz:

Said petition in substance proposed a subscription pursuant to the said act of May 15th, 1885, by the county of Mercer to the capital stock of said Louisville Southern Railroad Company to the amount of one hundred and twenty-five thousand dollars ($125,000), payable in the negotiable coupon bonds of the said county, which bonds
4 should be payable, principal and interest, at the Louisville Banking Company, in Louisville, Kentucky, the principal payable thirty years after date and the interest at the rate of five per cent. per annum, payable semi-annually, subject to the conditions and provisions specified in said act.

The proposition further provided for an agreement to be made by said railroad company that after the construction of its railroad through Mercer county, as provided in said act, it would construct certain buildings near Harrodsburg, and required that the trustee should retain twenty thousand ($20,000) dollars of the said county bonds until said buildings should have been erected, and as a security for their erection; but it was expressly provided that one hundred and five thousand ($105,000) dollars of said bonds should be delivered to the railroad company whenever its railroad should have been constructed through the county of Mercer, as provided in said act.

A copy of said petition will be filed herewith as part hereof, marked Exhibit "A."

On the same day, to wit, November 18th, 1886, the county judge of Mercer county did order an election to be held in said county on

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the day named therein, to wit, on the 4th day of December, 1886, to ascertain the sense of the legal voters thereof upon the question of making such subscription, and said county judge did cause notice of said election to be published in said county in a newspaper published therein, for more than ten days, and caused the same to be posted at the court-house door in said county and at the other public places named in said order. A copy of the said order will be filed herewith as part hereof, marked Exhibit "B."

Officers were duly appointed to hold and did hold said election at the time and in the manner required by said act and by said order, and made due and lawful return thereof to that said county judge in the manner provided in ordinary county elections.

At the election so held a majority of the legal votes cast were in favor of said subscription and were so ascertained and determined to have been cast by said county judge, and thereupon said county judge did enter an order subscribing in behalf of the county of Mercer to the capital stock of the said Louisville Southern in the amount of one hundred and twenty-five thousand dollars, payable in the negotiable coupon bonds of said county, in accordance with the terms of the proposition so voted upon, and said county judge did thereupon cause to be prepared and did execute 125 of the
5 negotiable coupon bonds of said county, bearing date of January 10th, 1887, each of the denomination of $1,000, payable thirty years after date, bearing interest at the rate of five per cent. per annum, payable semi-annually, said bonds and interest being made payable at the Louisville Banking Co., in the city of Louisville, Kentucky. John W. Hughes was at the time of said election and of the execution of said bonds and is still the county judge of Mercer county, and Ben. C. Allin was at the time aforesaid and still is clerk of the county court of said county, and each of said bonds was, as required by the act aforesaid, signed by said Hughes as county judge and attested by said Allin as county clerk, with his official seal attached thereto, and the coupons representing the semi-annual payment of interest therein were signed by said clerk. Said bonds are numbered serially from 1 to 125 (both inclusive), and with the exception of the numbers thereof in words and figures as follows, to wit:

BLEED.

UNITED STATES OF AMERICA.

$1,000. No. 105.

Louisville Southern Railroad Aid Bond.

County of Mercer,

State of Kentucky.

The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of one thousand dollars ($1,000) on or before the tenth day of January, A. D. one thousand nine hundred and seventeen (1917), at the Louisville Banking Company, in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent. per annum, payable semi-annually at said bank on the tenth days of July and January, after date respectively, in each year on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15, 1886, and pursuant to an order entered by the county judge of said county, in conformity with said act, subscribing in behalf of said county for the capital stock of the
6 Louisville Southern Railroad Company in the sum of one hundred and twenty-five thousand dollars ($125,000), which order was entered of record in said court on January tenth, A. D. eighteen hundred and eighty-seven (1887). If the County of Mercer shall determine to pay any part of said series of bonds before the end of thirty (30) years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz: in Harrodsburg and Louisville, Ky., and New York city, stating the time when such bonds will be paid, and such call of bonds shall be made consecutively, and not more than twenty-five thousand dollars of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

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In witness whereof, the County of Mercer by Jno. W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county, with his official seal affixed hereto, and the interest coupons attached hereto have been signed by the said clerk. Done on the tenth day of January, A. D. one thousand and eight hundred and eighty-seven.

[SEAL.] THE COUNTY OF MERCER,
By JNO. W. HUGHES, *County Judge.*

Attest: BEN. C. ALLIN, *Clerk.*

Attached to each of said bonds as originally executed there were sixty coupons representing the interest payable on the 10th days of January and July in each year respectively, and except as to the dates of maturity and the numbers of the bonds said coupons are all in form and tenor as follows, to wit:

"On the — day of ——, 18—, the County of Mercer, State of Kentucky, will pay to the bearer at the Louisville Banking Company, in the city of Louisvile, Ky., twenty-five dollars, being the semi-annual interest on the Louisville Southern aid bond No. —.

(Signed) BEN. C. ALLIN, *Clerk.*"

The said county judge caused said bonds to be deposited with one Isaac L. Pearson, as trustee, to be held in escrow and deliv-
7 ered to said Louisville Southern Railroad Company when it should become entitled to the same by the construction of its said railroad through the county of Mercer and into or through the corporate limits of the town of Harrodsburg in Mercer county; and before receiving said bonds said trustee gave bond with good surety approved by said county judge for the faithful performance of his duty.

Plaintiff further states that afterwards and within the time provided for by said act and by the terms of the proposition submitted and voted upon at said election as hereinbefore set forth the Louisville Southern Railroad Company did construct and so complete its said railroad through said county of Mercer that a train of cars could pass and did pass over the same, and did construct said railroad to and through the corporate limits of the town of Harrodsburg, and thereupon demanded a delivery of said bonds to the amount of $105,000.

Plaintiff further states that thereafter the said trustee, having been called upon and requested by said Louisville Southern Railroad Com-

pany to deliver to it or its assigns the said bonds to the amount of $105,000 par value thereof, notified the county judge of said county and notified the county court as composed of said judge and the magistrate of said county of the demand which had been made upon him for a delivery of said bonds and of his expectation and purpose to deliver the same unless directed or requested by said county court or county judge to withhold the delivery thereof. At the time of said notification the said county judge and the said county court and all its members had full knowledge and notice of the extent to which and the direction in which said railroad had been constructed into and through said county of Mercer. Neither the said county judge nor said county court made objection to said delivery, but assented thereto, and received for and on behalf of said county, and said county now holds the certificates for 1,050 shares of the capital stock of said Louisville Southern Railroad Company, being the same for which it had subscribed and for which the said bonds were deliverable in payment as aforesaid; and thereupon and thereafter the said trustee did deliver to the Louisville Southern Railroad Company or its assigns said bonds to the amount of $105,000 par value thereof, to wit: the said bonds numbered serially from one to one hundred and five (both inclusive), said delivery having been made about the month of August, 1888.

8 Plaintiff further states that thereafter, without knowledge or notice that there was, or that the county of Mercer claimed that there was any defect or infirmity in the said bonds or the coupons attached thereto, or in the title of the Louisville Southern Railroad Company or its assigns to said bonds and coupons, this plaintiff did in the regular course of business and for a full and valuable consideration purchase in the open market and from persons other than the Louisville Southern Railroad Company, being then the holders and owners thereof, one hundred of said bonds with the coupons thereto annexed, to wit: said bonds numbered serially from 6 to 105 (inclusive), and is now the holder and owner of said bonds and the coupons annexed thereto.

Plaintiff further states that the said county did heretofore for and during several years levy upon the people of said county a tax for the payment of the interest coupons on the whole of said one hundred and five thousand dollars of bonds, said tax having been so levied and collected for the years 1889, 1890, 1891 and January of 1892, and out of the tax so collected said county paid all of the coupons upon said $105,000 of bonds falling due after July 10th, 1888, to wit: coupons falling due on the 10th day of January and the 10th

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day of July, 1889; the 10th day of January and the 10th day of July, 1890; the 10th day of January and the 10th day of July, 1891; and the 10th day of January, 1892; but said county has failed and refused to pay the coupons on any of said bonds falling due on the 10th day of July, 1892, or any of them.

Plaintiff states that it is the lawful holder and owner of 100 of the coupons on said bonds falling due July 10th, 1892, being the coupons attached to said bonds respectively numbered serially from 6 to 105 (inclusive), and that by each of the said 100 coupons so held and owned by complainant said County of Mercer promised that on the 10th day of July, 1892, it will pay to the bearer at the Louisville Banking Company, in the city of Louisville, Ky., twenty-five dollars, being the semi-annual interest on the Louisville Southern Railroad aid bond to which said coupon was attached.

Said 100 coupons are filed herewith as part hereof, marked Exhibit "C."

By reason of the possession and ownership of said coupons said County of Mercer has become indebted to and has promised to pay to this plaintiff the amount of said several coupons, to wit: the sum of twenty-five hundred ($2,500) dollars, with interest thereon from the 10th day of July, 1892. Plaintiff caused said coupons to be
9 presented for payment and payment thereof demanded at said Louisville Banking Company on the 10th day of July, 1892, and payment thereof was refused; said county has failed and refused to pay the same or any part thereof, and the said entire sum is now due and unpaid.

Wherefore plaintiff prays for judgment against said County of Mercer in said sum of twenty-five hundred dollars ($2,500), with interest thereon from said date until paid, and prays for all proper relief.

BULLITT & SHIELD,
Att'ys for Plaintiff.

One of the said 100 coupons filed with the petition and marked "Exhibit C" is as follows, and the remainder are identical therewith, except as to number:

"On the 10th day of July, 1893, the County of Mercer, State of Kentucky, will pay to the bearer at the Louisville Banking Co., in the city of Louisville, Ky., twenty-five dollars, being semi-annual interest on Louisville Southern Railroad aid bond.

No. 6.

$25.00. BEN. C. ALLIN, *Clerk.*"

10 And at a term of our said court held for its October term, 1893, to wit: on November 2, 1893, came the defendant by its attorneys and filed its answer herein.

The answer referred to is as follows:

Circuit Court of the United States, District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Complainant,
vs.
COUNTY OF MERCER, STATE OF KENTUCKY, Defendant.
} Answer.

The defendant, The County of Mercer, in answer to the petition herein, says that as to various acts of the legislature of Kentucky referred to in the petition, and the contents thereof, it refers to said acts themselves. It also refers to the exhibits filed with the plaintiff's petition as correcting the allegations made in the petition in reference to their contents. It denies that officers of election did hold the said election in the manner and time required by the act, or by the said order. It denies that at the election so held a

11 majority of the legal votes cast were in favor of said subscription. It denies that afterwards, or within the time provided for by said act, or by the terms of the proposition submitted or voted upon at said election, or at all, the said Louisville Southern Railroad Company did construct or so complete its said railroad through said county of Mercer that a train of cars could or did pass over the same. It denies that either the said county judge of county court assented to the delivery of said 105 bonds or any part of them. It denies that the plaintiff, in the regular course of business, or for a full and valuable consideration did purchase in the open market one hundred or any of said bonds, without knowledge or notice that there was, or that the County of Mercer claimed that there was a defect or infirmity in the said bonds or in the title of the Louisville Southern Railroad Company or its assigns thereto. It denies that the plaintiff is the lawful holder and owner of one hundred or any coupons on said bonds, falling due July 10, 1892, or that this defendant has become or is indebted or has promised to pay to the plaintiff the amount of said several coupons or any of them.

Further answering, this defendant says that it was expressly provided in the said act under which the said bonds purport to have been issued that the said bonds shall not be binding or valid obligations until the railway of the said company, to wit, the Louisville

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Southern Railroad Company, shall have been so completed through such county, to wit, Mercer county, that a train of cars shall have passed over the same; and this defendant says that the railway of the said company has never been completed through such county at all, nor been so completed that a train of cars could pass over the same, and no train of cars has passed over the same, and that the said bonds and all of the coupons attached thereto, including those sued on, are void and of no effect.

Defendant further says that no election was ever held in Mercer county in accordance with the petition filed as set forth in the petition, nor in accordance with the notice given as alleged in the petition, nor in accordance with the act of *of* the legislature referred to in the petition, in this, that on and prior to the said election ordered to be held by the county judge of Mercer county, as set forth in the petition, the Louisville Southern Railroad Company made and entered into an agreement in writing with the town of Burgin, a duly corporated village situated within the limits of Mercer county, and with the chairman of the board of trustees of said town representing the people and tax-payers of said Burgin district, the

12 same being a part of Mercer county, and the voters thereof being a part and parcel of the legally qualified voters of Mercer, and to whom the proposition embodied and set forth in the petition, order, and notice was to be submitted; which agreement is in words and figures as follows, to wit:

"It is hereby agreed with the town of Burgin and its trustees, upon the part of the Louisville Southern Railroad Company, that if the present proposed subscription by Mercer county is carried, the said Louisville Southern Railroad Company will, by the time the said Louisville Southern railroad is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin to a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not, then the Louisville Southern guarantees that said Burgin shall be exempt from taxes from and on account of said subscription—that is, the Louisville Southern will pay the taxes of said Burgin district."

Which said agreement was signed by the Louisville Southern Railroad Company, by J. W. Stine, its president, and by the Southern Construction Company, by Bennett H. Young, its president, and was dated December 1, 1886, and delivered to the town of Burgin on or about that date; that the said pretended election was held on the 4th day of December, 1886, and that in the notice which was pub-

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lished on the said election no reference was made to this agreement with the town of Burgin, so that when said election was held upon the 4th day of December, 1886, the voters of Mercer county did not have the same proposition submitted to them, nor were they given notice of what were the real terms upon which the subscription was to be voted; and the defendant further says that the plaintiff at the time it purchased the said bonds, and each and every one of the owners thereof, through whose hands they passed into the hands of the plaintiff, had notice of the fact that this agreement had been so made by the said Louisville Southern Railroad Company with the town of Burgin prior to the date of the said election, and that notice of the same had not been given in the time and manner required by law to the voters of Mercer county, whereby this defendant says that the said election was not a legal or valid election, and that the proposition of subscription was never lawfully voted for or carried by the qualified voters of the county of Mercer.

Further answering, the defendant says that the said Isaac
13 Pearson, trustee, mentioned in the petition, was in possession of the whole $125,000 of the bonds of this defendant, and on August 6, 1888, in order to procure the said Isaac Pearson to deliver over 105 of said bonds to the Louisville Southern Railroad Company, the said Louisville Southern Railroad Company did enter into a contract of indemnity with the said Isaac Pearson, by which the said Louisville Southern Railroad Company, as principal, with Bennett H. Young, R. S. Veech, V. D. Price, W. H. McBrayer, and W. T. Grant, as sureties, agreed to indemnify and save harmless the said Pearson and his sureties from any damage, loss, or costs, ordinary or extraordinary, that the said Pearson and his sureties or any of them might sustain or might be held or made liable for on account of the delivery of said bonds; and but for such indemnity the said Isaac Pearson, trustee, would not have delivered the said 105 bonds to the Louisville Southern Railroad Company. Defendant says that the delivery of the said bonds so procured as aforesaid from the said Isaac Pearson, trustee, made the same of no force and effect, and that the said bonds and the coupons cut therefrom sued on herein by the plaintiff are not the act and deed of this defendant, and have never been lawfully delivered as such.

Wherefore the defendant prays that this suit may be dismissed, for its costs, and all proper relief.

JOHN W. HUGHES,
P. J. M. C. C.

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And on another day of said term of said court, to wit, on the 3rd day of February, A. D. 1894, came the plaintiff and defendant, by their respective counsel herein, and thereupon plaintiff filed herein its amended and supplemental petition, and by consent of parties it is ordered that the answer heretofore filed by defendant to the original petition shall be esteemed and treated as likewise an answer to said amended and supplemental petition.

And then plaintiff filed its reply to said answer of the defendant, and by consent of parties it is ordered that the affirmative allegations therein are controverted of record.

14 (The amended and supplemental petition, setting up coupons that matured during the pendency of the suit, is omitted per stipulation.)

15 The reply above referred to is as follows, to wit:

United States Circuit Court. District of Kentucky.

PROVIDENT LIFE AND TRUST COMPANY, Complainant,
vs.
COUNTY OF MERCER, Defendant.
} Plaintiff's Reply.

Plaintiff denies that the railway of the Louisville Southern Railroad Company has not been completed through the county of Mercer, or that it has not been so completed that a train of cars could not pass over same, and denies that no train of cars has passed over said railroad so completed as aforesaid, and denies that the bonds of Mercer county and the coupons thereto attached, mentioned in the petition, are or that any of them are void or of no effect.

Plaintiff denies that an election was not held in Mercer county in accordance with the petition, notice, an l act of the legislature mentioned and set forth in the plaintiff's petition herein.

Plaintiff denies that on or prior to the election ordered to be held by the judge of Mercer county, as set forth in its petition herein, the Louisville Southern Railroad Company made or entered into the agreement in writing with the town of Burgin, the village in the answer mentioned, or with the chairman and board of trustees of said town, which is set forth in the answer.

Plaintiff has no knowledge or information sufficient to enable it to form a belief as to whether or not a writing in form or
16 substance, as set forth in said answer, was or was not signed with the name of the Louisville Southern Railroad Co., by

J. W. Stine, its president, or by the Southern Contract Company, by Bennett H. Young, its president, or whether or not such a paper was or was not, on December 1, 1886, or at any time, delivered by either or both of said persons to said town of Burgin; but plaintiff denies that *if* such writing, if so signed and delivered, was either signed or delivered by or with the authority, knowledge, or consent of either said Louisville Southern Railroad Co. or said Southern Contract Company, and denies that same was or is the act or deed of either of said companies.

Plaintiff denies that at the time it purchased said bonds or at any time, until the filing of the answer herein, it had notice or knowledge that said agreement or that any agreement had been made by said Louisville Southern Railroad Company with the town of Burgin, or that notice of such agreement had not been given at the time and in the manner required by law to the voters of Mercer county, and denies that each or any of the owners of said bonds through whose hands they passed into the hands of plaintiff had such notice or knowledge.

Plaintiff denies that by reason of said alleged agreement or otherwise said election was not a valid or legal election or that the proposition of subscription was not lawfully voted for or carried by the qualified voters of Mercer county.

Plaintiff has no knowledge or information sufficient to enable it to form a belief as to whether or not on August 6th, 1888, or at any time, in order to procure Isaac Pearson to obtain 105 or any of said bonds of Mercer county the said Louisville Southern Railroad Company entered into a contract of indemnity with said Isaac Pearson by which said Louisville Southern Railroad Company, as principal, with Bennett H. Young and others, as surety, agreed to indemnify or save harmless said Isaac Pearson and his sureties from any damage, loss, or costs which said Pearson and his sureties might sustain or be held or made liable for on account of a delivery of said bonds, nor as to whether or not, but for such indemnity, said Pearson would not have delivered said bonds; but plaintiff says that if such a contract of indemnity was made or entered into, the fact was not known to this plaintiff when it purchased and paid for said bonds, nor was it informed thereof until the answer herein was filed. Plaintiff denies that the delivery of said bonds (even if procured, as alleged, from said Pearson, trustee) was of no force or effect, or that
17 said bonds and coupons are not the act and deed of the defendant, The County of Mercer, or may not have been delivered as such.

BULLITT & SHIELDS,
For Plaintiff.

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And on another day of said term of said court, to wit, Thursday, the 12th day of April, 1894, came the parties, by their counsel, and filed their written agreement within, which is as follows:

"It is agreed between the parties hereto and stipulated that the issues of fact in the above-entitled cause pending in this court may be tried and determined by the court without the intervention of a jury, the parties hereto waiving a jury.

March 30th, 1894.

PROVIDENT LIFE & TRUST COMPANY,
By BULLITT & SHIELD.
THE COUNTY OF MERCER,
By HUMPHREY & DAVIE, *Att'ys.*"

And at another term of our said court, held for its February term, to wit, on Tuesday, April 30th, 1895.

And now upon this day came the parties, by counsel, and the court delivered its special finding of fact herein, which is ordered to be spread upon the record, and is as follows:

FINDINGS OF FACT.

"The attorneys of record of the parties having duly filed herein with the clerk a stipulation in writing waiving a jury, in accordance with section 649 of Revised Statutes of the United States, the issues of fact herein were tried by the court, which now makes the following special finding, which is now ordered spread upon the record.

The county court of Mercer county was petitioned on the 18th day of November, 1886, by more than twenty-five resident tax-payers of said county, to submit to the vote of the legal voters of said county the question of whether or not said county should subscribe one hundred and twenty-five thousand dollars in the capital stock of the Louisville Southern Railroad Company upon certain terms and conditions stated in said petition, said petition being, except as to the names of the signers, fully set forth in the order of November 18th, 1886, hereinafter mentioned.

This petition was on that day (November 18) filed by the said county court, and an order was entered submitting said ques-
18 tion to the legal voters of said county and directing the vote to be taken on the 4th day of December, 1886.

This order is as follows:

BLEED.

Order of Submission.

"A petition of more than twenty-five tax-payers of this said county having this day been presented to said county court, which said tax-payers are residents of said county, and which said petition requests that the question of subscription to the capital stock of the Louisville Southern Railway Company upon the terms and conditions set forth in said petition shall be submitted to a vote of the legal voters of said county, and the said court being advised, it is ordered that the same be filed, which is done; and thereupon the said court made the following

ORDER,

To wit:

"Mercer County Court.

On this day application was made to the judge of the county court of Mercer county by the petition of more than twenty-five tax-payers resident in said county, requesting that the question of subscribing to the capital stock of the Louisville Southern Railroad Company upon the terms and conditions set forth in said petition be submitted to a vote of the legal voters of said county: which petition is in words and figures as follows, to wit:

"To the judge of the county court of Mercer county, Kentucky:

"The undersigned tax-payers, residing in the county of Mercer, request that the question of subscribing to the capital stock of the Louisville Southern Railroad Company by the said county be submitted to a vote of the legal voters of such county, under and in accordance with an act of the General Assembly of the Commonwealth of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company, approved May 15th, 1886; such subscription to be upon the following terms and conditions: That the said county shall subscribe to the capital stock of the said Louisville Southern Railroad Company the sum of $125,000, and the said subscription shall be paid in the negotiable coupon bonds of the said county, payable on or before thirty years after date, and bearing interest at the rate of five per cent. per annum, payable semi-annually, and principal and interest to be payable at the Louisville Banking Company, in the city of Louisville, Ky.: Provided, however, that if the county of Mercer shall determine to pay any part of said bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made

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in a newspaper published in each of the following places, to
19 wit: Harrodsburg and Louisville, Kentucky, and New York city, stating the time when such bonds will be paid. Said call of bonds shall be made consecutively according to their numbers, the lower numbers being called first, and not more than $25,000 of bonds shall be called in any one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount named in said call. But such bonds shall not be binding or valid obligations until the railroad of the said company shall have been so completed through such county that a train of cars shall have passed over the same, nor shall such subscription be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg to a connection with the Southwestern railway at its present depot in Harrodsburg; nor shall said bonds be delivered until the said railroad company shall have constructed in Harrodsburg or within one-fourth mile thereof a roundhouse, with not less than ten stalls, and shall have entered into an agreement in writing with the county judge of Mercer county, for the benefit of said county, to locate in Harrodsburg or within one-fourth mile thereof and within one year thereafter to construct and operate permanently there its terminal or divisional machine and repair shops, and such other shops or structures as may be necessary or convenient to the operation thereof; such agreement to be executed by the proper officers of said railroad company, accompanied by a certified copy of the resolution or proceedings of the stockholders of said company authorizing such agreement, and $20,000 of said county bonds shall be retained in the hands of the trustee or trust company, hereinafter named, as additional security for the performance of said agreement by said railroad company, and shall not be delivered to it until it shall have constructed the machine and repair shops and other structures mentioned in and contemplated by the aforesaid agreement. And the said company further agrees that should it fail to comply with said agreement that it will refund the bonds delivered or the value thereof.

"The Louisville Southern Railroad Company shall comply with the conditions of the subscription herein contemplated within five years from the time any subscription is made, else said subscription to be void and bonds cancelled.

"If a majority of the legal votes cast at such election shall be in favor of the subscription herein proposed, the said bonds shall
20 be executed and deposited with a trustee or trust company designated by the county judge, and shall be held in escrow

by said trustee or trust company and delivered to said railroad company in payment of said subscription when and as it shall become entitled to the same by the construction of its road through the county of Mercer, and by a compliance with the other conditions of the subscription as herein set forth. But before such delivery all past-due coupons attached to said bonds shall be clipped therefrom and destroyed by said trustee or trust company in the presence of the county judge.

"The trust company or trustee designated as a depositary of the bonds by the county judge shall, before receiving same, give bond, with good security approved by the county judge, for the faithful performance of his duty in the premises. As bonds are delivered to the railroad company, certificates for the capital stock of the Louisville Southern Railroad Company subscribed shall be delivered to the county judge for the use and benefit of Mercer county.

"Respectfully submitted."

"And thereupon it was and is hereby ordered that an election be held in the said county of Mercer on the 4th day of December, 1886, to ascertain the sense of the legal voters of said county upon the question of making the subscription as mentioned and set forth in said petition.

"It is further ordered that said notice of such election shall be published in the Harrodsburg Democrat, a paper published in said county, not less than ten days before said election, and that said notice be likewise posted at the court-house door in said county, and at the following additional public places therein, to wit: Burgin, Nevada, Cornishville, Bohon, Duncan, Dugansville, Salvisa and McAfee, Dixville, and at the Baton Rouge bridge. Said election to be held in manner and form as prescribed by an act of the General Assembly of the Commonwealth of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company, approved 15th May, 1886, being the same act mentioned in said petition. It is further ordered that the notice aforesaid shall be substantially in form as follows:

"*Notice.*

"To the legal voters of the county of Mercer:

Notice is hereby given to the legal voters of said Mercer county that on the 4th day of December, 1886, an election will be held in said county to ascertain the sense of the legal voters thereof
21 upon the question of making a subscription by said county

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to the capital stock of the Louisville Southern Railroad Company to the amount of $125,000.00, par value thereof, payable in the negotiable coupon bonds of the county upon the terms and conditions set forth in the petition of tax-payers hereinafter mentioned. Said election will be held pursuant to an act of the General Assembly of the Commonwealth of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company,' approved 15th of May, 1886, and pursuant to the following order this day made. (Order as above is copied.)"

I find that on December 4th, 1886, an election was held under said order, and that a majority of the legal voters voting voted for the county of Mercer to make said subscription upon the terms and conditions mentioned in the order submitting same, and that fact was ascertained and declared by the county court of Mercer county in an order entered January 10, 1887, and that said county subscribed $125,000 in the capital stock of the Louisville Southern Railroad Company upon the terms and conditions of said submission.

The order is as follows:

Order of Subscription.

January 8, 1887.—"This day came the Louisville Southern Railroad Company and by their attorney submitted to the court paper X, and ask that it be entered upon the record as an order of the court; and the court to be advised took time and adjourned court until Monday next."

January 10, 1887.—"In the matter of the subscription by the county of Mercer to the capital stock of the Louisville Southern Railroad Company. Whereas, on the 18th day of November, 1886, an order was made by the county judge of the county of Mercer, which order was entered on said day on the records of the Mercer county court, which order is in words and figures as follows, viz: 'A petition of more than twenty-five tax-payers of this said county having this day presented to said county court, which said tax-payers are residents of said county, and which said petition requests that the question of subscription to the capital stock of the Louisville Southern Railway Company upon the terms and conditions set forth in said petition shall be submitted to a vote of the legal voters of said county; and the said court being advised, it is ordered that the same be filed; which is done; and thereupon the said court made the following order, to wit:' (Here is repeated, word for word, the order entered Nov. 18th, 1886.)

BLEED.

"And whereas pursuant to said order the said county judge
22 did cause notice of said election to be published in the Harrodsburg Democrat (a paper published in the county of Mercer), more than ten days before the 4th of December, 1886, and did likewise cause said notice to be posted at the court-house door in said county, and at the following additional public places therein, viz: Burgin, Nevada, Cornishville, Bohon, Duncan, Dugansville, Salvisa, and McAfee, Dixville, and Baton Rouge bridge; which notice so published and posted as aforesaid is in words and figures as follows, viz:

Notice.

(Here is repeated, word for word, notice contained in the order Nov. 18th, 1886.)

"And whereas the election ordered aforesaid was duly held pursuant to said order, in the county of Mercer, on the 4th day of December, 1886, and the returns thereof have been duly and legally made to and examined and compared by the Hon. John W. Hughes, judge of the county court of Mercer county, in the manner provided in the act authorizing said subscription hereinabove mentioned: Now, therefore, it has been and is now ascertained, determined, and adjudged by the county judge of Mercer county that the total number of legal votes cast at said election were as follows: For the railroad subscription, 1,683 votes, and against the railroad subscription, 1,250 votes, and that a majority of the legal votes cast at said election were in favor of said subscription. And it is now further ordered and adjudged that the county of Mercer does hereby subscribe to the capital stock of the Louisville Southern railroad $125,000 par value thereof, this subscription being made subject to and in accordance with the terms and conditions of the proposition as set forth in the petition recited in the order of November 18, 1886, above mentioned and voted on as hereinbefore recited."

Upon the order book of said Mercer county, as a part of the orders thereof, written thereon by the clerk of the court, among the orders signed by the judge thereof is the following:

Order.

"And upon the same day, to wit, January 10, 1887, this day, and before the above order was entered, came O. S. Poston and T. H. Hardin, two citizens and tax-payers of Mercer county, Kentucky, and presented the contract or agreement dated December 1, 1886,

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which reads as follows, said agreement being signed Louisville Southern Railroad Company, by J. W. Stine, president; Southern Contract Company, by Bennett H. Young, president:

23 "It is hereby agreed with the town of Burgin and its trustees, upon the part of the Louisville Southern Railroad Company, that if the present proposed subscription by Mercer county is carried the said Louisville Railroad Company will by the time the said Louisville Southern is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin, a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not, then the Louisville Southern guarantees that said Burgin district shall be exempt from taxes from and on account of said subscription—that is to say, the Louisville Southern will pay the taxes of said Burgin district.

This December 1, 1886.

LOUISVILLE SOUTHERN RAILROAD COMPANY,
By J. W. STINE, *President.*
SOUTHERN CONTRACT COMPANY,
By BENNETT H. YOUNG, *President.*"

"And move the court that the conditions therein be complied with before the bonds to be issued herein are delivered, and be added to the order this day applied for by the Louisville Southern Railroad Company as one of the conditions annexed thereto and as a part of the conditions of the issuing of said bonds and the order entering said subscription of Mercer county to said Louisville Southern Railroad Company; which the court refused to do. To all of which Poston and Hardin excepted. Before this order was made or acted upon John Nichols withdrew said paper, who had it before it was offered."

But the court finds that said paper is not an order of said Mercer county court and not properly on its order book.

I find that in pursuance of said order and vote the coupon bonds of the county of Mercer were prepared and executed to the extent of $125,000 by John W. Hughes, presiding judge of said county court, and the coupons attached were signed by Ben. C. Allin, the county clerk of said court, and thus signed, said bonds and coupons were delivered to D. L. Moore, who had previously been appointed by said county court trustee under the provisions of the act of May 15,

1886, and said order of January 10, 1887, and that he received said bonds on March 3, 1887.

24 The order of the said court appointing said Moore trustee, entered February 7, 1887, is as follows:

Order Appointing Trustee.

"This day came the Louisville Southern Railroad Company, by their attorney, and moved the court to appoint a trustee to hold the bonds in escrow, to be executed by the county of Mercer to the Louisville Southern Railroad Company in pursuance of an order heretofore made by this court on the 10th day of January, 1887, subscribing stock to said road, and thereupon the court appointed D. L. Moore trustee to hold said bonds in escrow, to be delivered to said Louisville Southern Railroad Company when said company shall comply with the terms and conditions of said subscription as set out in said order and as prescribed and set forth in an act of the legislature of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company, approved May 15, 1886. Said trustee before receiving said bonds is required to give bond, with good surety, to be approved by this court, for the faithful performance of his duty in the premises."

On February 14th, 1887, D. L. Moore executed bond, with surety approved by said county court, in words as follows, viz:

"Whereas, on the 7th day of Feb'y, 1887, D. L. Moore was appointed by an order of the judge of Mercer county court trustee to hold in escrow certain bonds therein mentioned and to deliver the same to the Louisville Southern Railroad Company when said company shall fully comply with the terms and conditions of a subscription as set out in said order, and the previous orders of this court relating thereto, and as prescribed *as* set forth in the act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886:

Now, therefore, I, D. L. Moore, as principal, and Jas. H. Moore and W. H. McBrayer, as surety, bind and obligate ourselves to the Commonwealth of Kentucky for the use and benefit of Mercer county and the Louisville Southern Railroad Company that the said D. L. Moore will faithfully perform his duty as trustee as aforesaid in the premises.

Feb. 14, 1887.

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Executed in my presence and approved by me this 14th day of Feb'y, 1887.

JOHN W. HUGHES,
Presiding Judge of the Mercer Co. Court.
D. L. MOORE, *Principal.*
J. H. MOORE, *Security.*
W. H. McBRAYER,
By C. M. DEDMAN, *Att'y-in-Fact.*"

25 I find that said D. L. Moore presented to said county court on the 3rd of July, 1888, his resignation as trustee, in a letter in these words, viz:

JULY 2, 1888.

To the judge of the county court of Mercer county:

Not being able, even with the advice of the best legal lights in this section, to make plain my duties as trustee of the Mercer County bonds, voted in aid of the Louisville Southern railroad, and fearing to assume a duty not plainly laid down by the act or the contract, I prefer to return the trust and deliver back the bonds in my custody rather than to proceed in the dark, and hereby tender my resignation.

(Signed) D. L. MOORE.

And thereupon the said court, with the consent of the Louisville Southern Railroad Company, accepted the resignation of the said D. L. Moore, and the court on the same day appointed Isaac Pearson trustee to hold said bonds and deliver same to the Louisville Southern Railroad Company when it complied with certain terms and conditions of the subscription, as set out — the previous order and as prescribed by the act of the legislation of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and that said Pearson accepted the said trusteeship and executed bond, which was approved.

The said order is in these words, viz:

Order Appointing New Trustee.

"And the said Louisville Southern railroad, by their attorney-in-fact, consenting of record, the court thereupon accepted the resignation of the said D. L. Moore, trustee, as aforesaid.

"And thereupon the court appointed Isaac Pearson trustee to hold the bonds in escrow heretofore executed by Mercer county to the Louisville Southern Railroad Company, and to be delivered to said company when said company shall comply with the terms and

conditions of the subscription as set out in the previous orders of this court and as prescribed and set forth in an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886.

"Said trustee is required to give bond with good security to be approved by the court for the faithful performance of his
26 duties in the premises. And thereupon came the said Isaac Pearson and executed bond as required by law, with A. B. Bonta, Wm. H. Riker, Geo. Bohon, M. T. Threlkeld, M. Tabler, S. B. Sullivan, H. C. Williams, J. E. Cogar, and James M. Forsythe as his sureties, and said bond was approved by John W. Hughes, presiding judge of the Mercer county court, and so endorsed, and said bond is ordered to be spread upon the record of this court and is in the words and figures as follows, to wit:

"Whereas, on the 3rd day of July, 1888, Isaac Pearson was appointed, by an order of the Mercer county court, trustee to hold in escrow certain bonds therein mentioned, and to deliver the same to the Louisville Southern Railroad Company when said company shall fully comply with the terms and conditions of a subscription as set out in said order, and the previous orders of this court relating thereto, and as prescribed and set forth in an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886.

"Now, therefore, I, Isaac Pearson, as principal, and A. B. Bonta, W. H. Riker, George Bohon, M. T. Threlkeld, M. Tabler, C. B. Sullivan, H. C. Williams, J. E. Cogar and Jas. M. Forsythe, as sureties, bind and obligate ourselves to the Commonwealth of Kentucky for the use and benefit of Mercer county, and the Louisville Southern railroad, that the said Isaac Pearson will faithfully perform his duty as trustee aforesaid in the premises.

"July 3, 1888.

ISAAC PEARSON, *Principal.*
WM. K. RIKER.
A. B. BONTA.
GEORGE BOHON.
M. T. THRELKELD.
M. TABLER.
C. B. SULLIVAN.
H. C. WILLIAMS.
J. E. COGAR.
1—213 JAMES M. FORSYTHE.

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"Executed in my presence and approved by me this 3rd day of July, 1888.

"JOHN W. HUGHES,
"*Presiding Judge of Mercer County Court.*"

27 I find that said Pearson as said trustee received on the 9th day of July, 1888, all of said bonds with coupons attached from said D. L. Moore, and said Moore was discharged from his trusteeship.

I find that the bonds which were delivered to Isaac Pearson, trustee, were dated January 10th, 1887, and were each of the denomination of one thousand dollars ($1,000), and of like tenor and date, and the following is a copy of one of said bonds:

(Omitted per stipulation, as it is copied in full in the petition, *supra.*)

28 I find that prior to June 1st, 1888, the Louisville Southern railroad was completed from the city of Louisville, in Jefferson county, via Shelbyville, in Shelby county, and Lawrenceburg, in Anderson county, and in Mercer county to the depot of the Southwestern railroad in Harrodsburg, and that said company owned all the capital stock of the Southwestern railroad, had taken possession of its line, and had extended the track to Burgin, which was a village on the Cincinnati Southern railroad, and there connected it with said Cincinnati Southern railroad, and that on said day, June 1st, 1888, a train of cars moved by a steam-engine passed over said railroad from Louisville through Harrodsburg to Burgin and returned over said railroad track to Louisville, and since said time said railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern railroad.

That on the 27th of June, 1889, the Southwestern railroad was consolidated with the Louisville Southern railroad and was by an agreement of that date merged into the latter corporation, and that said Southwestern railroad was constructed and operated prior to November, 1886, and ran from its depot in Harrodsburg to a junction with the Cincinnati Southern railroad, which was about three-fourths of a mile south of Burgin, and that after said railroad came into possession of the Louisville Southern Railroad Company
29 it was extended to Burgin and the junction with the Cincinnati Southern R. R. made at that point, and this was done prior to June 1st, 1888.

I find that from Harrodsburg to the point where the Louisville Southern railroad crosses the line between Anderson and Mercer counties is fifteen (15) miles and the distance from Harrodsburg to Burgin over the Southwestern railroad as extended is 4.72 miles, and Burgin is three (3) miles from the south line of Mercer county and from the extreme east line of Mercer county 4.74 miles, and that following the line of the Cincinnati Southern railroad to south line of Mercer, which is the dividing line between that county and Boyle, Burgin is distant three (3) miles and from Danville seven (7) miles. The nearest point to Mercer county line from the Southwestern railroad is two miles.

I find that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of county, but that its railroad entered Mercer county on the line of said county next to the Anderson county and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point.

The railroad thus constructed gave a railroad connection by the Cincinnati Southern railroad, either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee.

I find that about the time of the passage of a train of cars of said road from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the tax-payers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him before his resignation as trustee.

This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed. While this discussion was going on and before Pearson, trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern railroad prepared to extend its railroad toward and to the town of Danville, Boyle county, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer county line.

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There was a movement made to have the court of claims of said county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the county judge, Hon. John W. Hughes, and all of the justices of the peace of said county. The court after argument declined as a court to instruct the trustee as to his action, but upon motion of one of the justices they passed and had spread upon the records this resolution, viz:

"At a county court of claims for Mercer county, at the court-house in Harrodsburg, on Tuesday, the 26th day of June, 1888.

Present: John W. Hughes, J. P. M. C. C., and M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, Jno. W. Reed, E. R. Norton, R. L. Mullins, E. I. Massie, N. Harris, G. J. Johnson, B. O. Jones, A. Johnson, J. C. McIntire, and Jno. T. Pankey, justices of the peace of Mercer county.

G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern railroad, but as individuals they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle county line.

And said motion being seconded, the ayes and nays were taken, and resulted as follows:

Ayes, 12, as follows:

M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, Jno. W. Reed, E. R. Norton, R. L. Mullins, N. Harris, G. J. Johnson, B. O. Jones, J. C. McIntire, and Jno. T. Pankey.

Nays, none; not voting, two, as follows:

W. I. Massie and A. Johnson."

I find that Pearson, trustee, after his acceptance of his trusteeship, decided the conditions precedent had been performed by the
31 Louisville Southern Railroad Company and — was entitled to the delivery of $105,000 of the bonds of Mercer county, and that on the — day of August, 1888, he did deliver said bonds in the presence of Hon. Jno. W. Hughes, county judge of said county, and that the past-due coupons on said bonds were cut off before delivery and were burned in the presence of said Hughes, and that there was delivered to said county at the time of delivery of said bonds a cer-

BLEED. T

tificate for $105,000 of the capital stock of the Louisville Southern Railroad Company. I find that said stock was accepted by said county and voted by the Hon. John W. Hughes as county judge at stockholders' meeting on at least two occasions, one on December 18th, 1888, and another on May 26th, 1890, and that said stock certificate is still held by said County of Mercer, and that it has never been tendered to the Louisville Southern R. R. Co. or any one representing said company.

I find that said stock was so voted by said John W. Hughes, county judge of Mercer county, at meeting of the stockholders of the Louisville Southern Railroad Company, in favor of the following resolutions, to wit:

I.

On December 13th, 1888, same was voted in favor of the following resolutions, to wit:

I. A resolution approving and directing the execution and delivery of a lease of the Louisville Southern railroad to the Louisville, New Albany & Chicago Railway Company for a term of thirty years.

II. A resolution authorizing and directing:

(1.) The extension of the main line of the Louisville Southern road from Lawrenceburg via Versailles to Lexington and Georgetown, Kentucky.

(2.) A consolidation of the Louisville Southern Railroad Company with the Louisville and Southeastern Railway Company, the Versailles and Midway Railway Company, and the Southwestern railway or any of them.

(3.) The increase of the capital stock of the company in the amount of $1,000,000 and the execution and delivery of bonds of the Louisville Southern Railroad Company to the amount of $1,500,000, to be secured by mortgage on the proposed extension of the line for the purpose of constructing same.

32 III. A resolution approving and directing execution and delivery of a contract with the Southern Contract Company for the construction of said proposed new or extended line for the express purpose, as above mentioned, of ultimately reaching "the Virginia line" by this route.

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II.

On May 28th, 1890, the County of Mercer voted its 1,050 shares of stock in favor of the following resolutions:

I. A resolution thanking the president and directors "for the manner in which they have conducted the company's business during the past year."

II. A resolution accepting a legislative amendment of the charter of the railroad company; said amendment authorizing the company to issue its bonds "for any corporate purposes" in any amounts desired and to secure same by mortgage; also authorizing the company to lease its road to any other railroad company.

III. A resolution approving the action of the board of directors in taking possession of the road on March 27th, 1890, and in effect cancelling the lease thereof to the Louisville, New Albany and Chicago Railway Company.

IV. A resolution approving the consolidation of the Louisville Southern Railroad Company with the Southwestern Railroad Company.

V. The stock was voted for the election of the directors for the ensuing year.

At the same meeting the County of Mercer voted its said stock to approve the minutes of two preceding meetings of stockholders held respectively in May, 1889, and May, 1890.

I find that said County of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1st, 1892, and have not paid any interest on said bonds since that time.

I find that J. W. Stine signed as president of the Louisville Southern Railroad Company, as did Bennett H. Young as president of the Southern Contract Company, a writing purporting to be a contract with the town of Burgin. This writing was signed the day of its date, and was given before the election in the county of Mercer upon the question of the subscription of the $125,000 to the capital stock of the Louisville Southern Railroad Company; that the execution of said writing was not generally known to the voters of said
33 county before said election, but was known to many of the voters at the Burgin precinct and induced some of said voters

to vote for the subscription. I further find that the execution of said writing was known to the Hon. John W. Hughes when he determined the result of the vote of said election and subscribed for the $125,000 of the capital stock of said Louisville Southern Railroad Company; and that there was no legal or corporate authority in either said Stine or Young to bind their respective companies by said writing. The said writing is as follows:

Burgin Agreement.

It is hereby agreed with the town of Burgin and its trustees upon the part of the Louisville Southern Railroad Company that if the present proposed subscription by Mercer County is carried, the said Louisville Railroad Company will, by the time the said Louisville Southern is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin, a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not then, the Louisville Southern guarantees that said Burgin district shall be exempt from taxes for and on account of said subscription—that is to say, the Louisville Southern will pay the taxes of said Burgin district.

This December 1st, 1886.

LOUISVILLE SOUTHERN RAILROAD COMPANY,
By J. W. STINE, *President.*
SOUTHERN CONTRACT COMPANY,
By BENNETT H. YOUNG, *President.*

I find that an indemnifying bond was executed and delivered to Pearson, trustee, about the time of the delivery of the $105,000 of bonds, the terms of which are as follows, viz:

Bond of Indemnity to Pearson.

AUGUST 6TH, 1888.

Whereas the County of Mercer voted a subscription of one hundred and twenty-five thousand dollars to the Louisville Southern Railroad Company, on certain terms and conditions recited in the order of the Mercer county court made the 18th day of November, 1886, which order is made part hereof; and

34 Whereas the bonds for the payment of said subscription have been signed by the judge of the Mercer county court and then placed in the hands of Isaac Pearson, as trustee, who has

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executed bond with A. B. Bonta, W. H. Riker, George Bohon, M. K. Threlkeld, C. B. Sullivan, H. C. Williams, J. E. Cogar, and James M. Forsythe as his sureties for the faithful discharge of his duties as trustee; and

Whereas the round-house mentioned in said order of subscription, as well as all other antecedent conditions therein set forth and set forth in the act of legislature under which said subscription was voted and made and claimed by said Louisville Southern Railroad Company to have been complied with so as to make one hundred and five thousand dollars of said bonds now deliverable to said company, and said company, by its written obligation, agreed and bound itself to and with John W. Hughes, presiding judge of the Mercer county court, for the benefit of said county, to locate in Harrodsburg or in one-fourth of a mile thereof, and within one year from the date of this bond to construct and operate permanently within said town or one-fourth of a mile thereof its terminal or division machine or repair shops and such other shops or structures as may be necessary or convenient to the operation of the road of said company, which agreement is executed by the proper officers of said railroad company, accompanied by certified copy of the resolution or proceedings of the stockholders of said company; and

Whereas said railroad company have executed bond under the provisions of "An act for the protection of counties, cities, etc., subscribing stock in railroads, turnpikes, and other improvements," approved April 30, 1873; and

Whereas the said trustee in good faith believes that the conditions and terms of the order of subscription and other orders in the case have been complied with so as to entitle the said company to receive $105,000 of said bonds, but some expressing doubts thereof, and the said railroad company, in order to obtain possession of said $105,000 of said bonds, are willing to and do hereby covenant and agree to save said trustee and his sureties harmless, if the trustee will and does deliver said bonds to said company, and with this understanding and agreement the said trustee had delivered $105,000 of said bonds to said company, after cutting therefrom all past-due coupons:

"Now this contract of indemnity witnesseth, that the Louisville Southern Railroad Company, through its duly authorized
35 officers, and being authorized to execute this contract and covenant by a vote of its stockholders and directors, together with Bennett H. Young, R. H. Veech, C. D. Price, W. H. McBrayer, and W. T. Grant, as its sureties, in consideration of the premises and the delivery of the bonds, the receipt of which is hereby acknowledged, do hereby jointly and severally bind and obligate ourselves

to said Pearson and his said sureties and each of them that they will indemnify and save harmless said Pearson and his sureties against all damages, loss or costs, ordinary or extraordinary, that they or any of them may sustain or may be held liable for on account of the delivery of said bonds aforesaid."

LOUISVILLE SOUTHERN RAILROAD COMPANY,

[SEAL] By BENNETT H. YOUNG, *President.*

Attest: W. H. HILL, *Secretary.*

BENNETT H. YOUNG.
R. S. VEECH.
V. D. PRICE.
W. H. McBRAYER.
W. T. GRANT.

I find from the evidence that this bond of indemnity was given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding the condition precedent had been performed by the Louisville Southern Railroad Company.

I find that the Provident Life and Trust Company was at the institution of this suit, the *bona fide* holder for value of the bonds mentioned to the extent of $100,000 with the coupons thereon, having purchased some of the Investment Company of Philadelphia, and in that city, at par and accrued interest amounting to $101,197.22, without knowledge or notice of any defects, either in the execution or delivery of same, or of any defenses the County of Mercer has or might present to the recovery of same.

The court also delivered an opinion herein, which is ordered to be filed.

JUDGMENT.

It is thereupon considered by the court that the plaintiff, The Provident Life & Trust Company of Philadelphia, do recover of the defendant, The County of Mercer, the sum of $2,500, with interest from the 10th day of July, 1892, and the further sum of $2,500, with interest from the 10th day of January, 1893; and $2,500, with interest from the 10th day of July, 1893, and $2,500 with interest from the 10th day of January, 1894, making in all the sum of eleven thousand two hundred and thirty-three $\frac{33}{100}$ dollars
36 ($11,233.33), with interest from this date; and its costs herein expended, for which it may have execution.

The opinion above referred to is as follows:

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Circuit Court of the United States for the District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
THE COUNTY OF MERCER, Defendant.
} Opinion.

These being the material facts, the first inquiry is, Can the defendant raise the question of the non-performance of the condition precedent in regard to constructing a railroad through the county of Mercer—that is, running from one boundary line of the county, through the county to the opposite or to another boundary line of said county?

The 3rd and 4th sections of the act authorized the subscription to the capital stock of the Louisville Southern Railroad Company and its payment in negotiable coupon bonds; the 4th section provides that—

"The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company, in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of the road through such county; provided, however, that such trust company or
37 trustee shall, before receiving such bonds, give bond, with good surety, *provided* by the county judge, for the faithful performance of his or its duty in the premises.

And provided further, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The terms of the subscription of $125,000 to the Louisville Southern Railroad Company *was* in conformity to this provision of the act, and it will be observed that there were several things to be determined on the face of this act in regard to the condition precedent and the performance thereof. The railway of the Louisville Southern Railroad Company was to be "so completed through such county that a train of cars shall have passed on the same," and this railway

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should "pass to or through the corporate limits of the town of Harrodsburg," else the bonds were not to be valid.

These coupon bonds were by the terms of the act to be executed by the county judge and clerk as soon as practicable after the subscription to the stock was voted, and then to be given to a trustee appointed by the county judge, and by whom a bond for the faithful performance of his duty had theretofore been given to the county, to be held by him until these conditions were performed.

Neither this act or the terms of the subscription expressly state this trustee should conclusively determine whether these conditions precedent had been performed by the railroad company; but must not that have been the intent?

It is clear this trustee was to deliver the bonds when the conditions precedent were performed; but upon whose judgment?

Not upon the judgment of the county judge, we think, because the act expressly requires him to execute the bonds and deliver them to the trustee, and the order of submission and the terms of the subscription required that the trustee should cut off and destroy in the presence of the county judge all past-due coupons, thus recognizing that he was only to be a witness to the acts of the trustee, and not a judge.

The decision of whether these conditions precedent had been performed and these bonds should be delivered must have been in the trustee, or in nobody. These negotiable bonds payable to bearer of the county of Mercer were by the provisions of this act and the terms of this subscription to go upon the open market as valid obligations of the county by force of the decision and delivery of the trustee, or they were always to be open to the inquiry as to
38 their validity or invalidity whenever the county chose to raise the question of the performance of these conditions precedent.

It is insisted that these conditions precedent were physical facts which a purchaser of the bonds was bound to know had been performed at his peril; these bonds had thirty years to run, and one of the conditions was that the railway should be so constructed through the county that a train of cars shall have passed over it. Thus a purchaser even twenty-five years after their date would have to prove, if the question was then made, not only that this railway was constructed through the county of Mercer, but that a train of cars had or could have passed over it before the delivery of the bonds, or, if not before, within five years after the subscription of stock, January 10th, 1887.

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If the question of the performance of these conditions precedent, because they were physical facts, were to be kept open indefinitely, why should there have been the selection by the county judge of a trustee, and why should such trustee be required to give bond with security for the faithful performance of his duty? Indeed, why should the authority have been to issue negotiable bonds at all if the legislative intent and that of voters of Mercer county was that the question of their validity could be made at any time and against every *bona fide* holder?

Again, this record shows that the performance of these conditions precedent did not depend upon the determination of physical facts only, but that the meaning of "through" in the act and in the terms of the subscription of the stock was most important to determine, and about this there was and is serious and honest difference of opinion.

It is quite evident that the county authorities construed the authority of the trustee to be to determine for the county the question of the performance of the conditions precedent and upon this determination to deliver or refuse to deliver these bonds. This is clearly shown by the resolution of the justices of the peace presided over by the county judge on the 26th day of June, 1887, and by the statement of the Hon. Jno. W. Hughes, county judge, as well as his acceptance of the resignation of D. L. Moore, as trustee, and his action at the time of the delivery of these bonds and since.

It should not be overlooked that these bonds could be legally issued by the County of Mercer, and that they were perfect commercial instruments in form, when delivered by the county judge to the trustee Moore and when handed over by him to his successor,
39 Pearson, and that the obvious purpose of the act which authorized these bonds was to make these bonds commercial instruments at some time or other, and as such to bind the county.

These bonds are clearly distinguishable from that class of bonds attempted to be issued by municipalities beyond the constitutional limit, and when the means of knowing such limit is of record, or when the municipality is without legislative authority to issue the bonds at all, or in the manner or in form in which they had attempted to be issued. It is insisted the word "escrow" in this act is used in its strictest and most technical sense, and that unless these conditions precedent had been performed, in the opinion of the court the plaintiff cannot recover, although these bonds were delivered by the trustee to be put on the market and were purchased for full value without notice or knowledge of the non-performance of the conditions precedent.

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The able counsel quotes from 6 Am. & Eng. Enc. of Law, page 867, that "when a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. * * * Even if the grantee obtains possession of it before the condition has been performed, yet it is not the grantor's deed and he may avoid it by pleading *non est factum*. The grantee cannot acquire the title by gaining possession of the deed by theft, by fraud, or by the voluntary act of the depositary, but only by the performance of the condition. * * * Although it is well settled that an escrow delivered without authority or obtained fraudulently passes no title to the grantee or obligee, there is some conflict of opinion as to the rights of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions, but the better opinion seems to be that such purchaser acquires no title."

We have indicated the opinion that, construing this entire act and considering its undoubted purpose to authorize negotiable bonds to be issued and sold on the market to raise money, the trustee Pearson did not receive these bonds merely as an escrow, and that the use of the word escrow in this act does not so limit the holding or authority of the trustees.

But if it be conceded these bonds were held by the trustee Pearson merely as an escrow and that the quotation be a correct statement of the law as applied to deeds, is there no difference when the escrow are bills of exchange, notes and other commercial paper, and has passed into the hands of an innocent and *bona fide* purchaser for value?

The learned counsel concedes a difference and argues that the difference is because a negotiable instrument does not bear on its face any evidence that it ever has been in escrow.

But does it not often happen that this is true in regard to a deed as well as to a note or other negotiable instrument which has been held as escrow?

We think the difference in the rule as to innocent purchasers for value is and should be because of the difference in the nature, purpose and legal effect of a deed and that of commercial paper.

The deed is the conveyance of title to lands and other visible property which does and is not intended to pass by delivery or to be used in general trade and commerce, and the other is an obligation to pay money to order or bearer and passes and is intended to be used by mere endorsement or delivery; hence in the interest of trade and commerce the obligor in a commercial instrument should take the risk of the action of the depositary whereby the commercial

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paper goes on the market or in the avenues of trade and comes into the hands of an innocent purchaser for value.

In Fearin *vs.* Clark, 16th Mass., page 76, which was a case where a promissory note had been delivered by the depositary to the payee without the conditions precedent being performed, and when the court held the note was good and valid in the hands of an innocent purchaser without notice, the court say:

"The rule is different in regard to a deed, bond or other instrument placed in the hands of a third party as an escrow, to be delivered on the happening of a future event or contingency; in that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it is placed in the hands of the party to whom it was entrusted. But the law aims to secure free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiations of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers to fall on those who enabled them to hold themselves out as the owners of the paper *jure despondi* and not innocent holders who have taken it for value without notice." This view is sustained in the case of Vollett *vs.* Parker, 6 Wend., 619. In the case of Bar-
41 ton *vs.* Huntington, 21 Mich., 433, the court states the law as herein indicated and draws a distinction between the case where the depositary improperly delivers a bill or negotiable note, and that where the bill or note has not been delivered by the payer at all, but is taken without the knowledge or consent of the payer while in his possession.

There is another view of the facts in this case which entitled the plaintiff to recover, we think, and that is the conduct of the county authorities of Mercer presumably with the consent of the tax-payers of the county.

There was a difference of opinion as to the meaning of the word "through" as used in the act of the legislature and the terms of the subscription, hence whether the Louisville Southern Railroad Company had complied with the conditions precedent in regard to running its railroad through the county of Mercer, and while that difference and uncertainty existed the railroad company commenced and did prepare in part to remove all doubt by running its railroad through the county—that is, from one line of the county to another line of the county to Danville, which would be a performance of the conditions precedent, by any construction of the meaning of the condition, and while the company was thus preparing to run its railroad

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to Danville the trustee, Pearson, assumed to and did deliver these bonds to the Louisville Southern Railroad Company, and the County of Mercer, by its county judge, received the certificate of stock for the amount of capital stock paid for by said bonds, which stock was voted and the interest on said bonds paid until the five years expired within which the conditions precedent if unperformed could have been performed.

This delivery of these bonds was made after public notice and under the individual advice of all of the justices of the peace of the county except two, and they expressed no opinion, and in the presence of the county judge who witnessed the destruction of the *passed*-due coupons, and accepted the certificate of stock given for the bonds thus delivered.

If a delivery of even a deed given by one person to another and held in escrow had been delivered by the depositary under circumstances similar to those in this case, surely the deed thus delivered would bind the grantor whatever may have been the terms of the escrow. How much stronger, then, is a case when the subject of the escrow is negotiable bonds and the holder is an innocent and *bona fide* holder for value.

42 It may, however, be insisted that in the instance mentioned of the deed executed by one person to another and held in escrow, the delivery would be good under circumstances similar to those in this case because of the grantee's knowledge and acquaintance in the delivery of the deed under a construction of the condition precedent, and the belief of the holder of the escrow that the condition precedent thus construed had been performed, while in the case at bar Mercer County had no representative and could have none to acquiesce to any construction of the condition precedent or to consent to the delivery of these bonds.

This suggestion emphasizes, we think, the inaccuracy of the contention that the legislature intended to authorize the issuing of negotiable coupon bonds with thirty years to run, and of course for the purpose of sale by the Louisville Southern Railroad Company for cash in the market, and yet it authorized no one to determine the validity of the bonds so as to bind the County of Mercer, and thus make them in law what they appeared on their face to be, binding commercial obligations in the hands of those who purchased for value without notice. If no one could bind the county, and nothing that was or could be done by its officers could make these bonds binding, then their validity remained an open question until some court having jurisdiction determined the question in a suit against said county, and then only to the extent of the bond or coupon owned

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by the suing party, and thus their value as commercial paper is destroyed.

It should require clear language before a court should construe one part of an act so as to nullify another, and thus destroy the value and efficiency of the whole act.

The effect of the giving of the writing to the town of Burgin by Messrs. Young and Stine on the 1st of December, 1886, would have been a proper inquiry when the county judge was considering the result of the election on December 4th, 1886, but the county judge declared the question of subscribing for the stock in the Louisville Southern Railroad Company as submitted carried and subscribed for the stock and executed the bonds with full knowledge of the execution and delivery of this writing. The defendant is bound by this action of its county judge, and cannot plead the execution and delivery of that paper or its effect upon some of the voters of the county as a defense to this suit.

We deem it unnecessary to decide whether the Louisville Southern Railroad Company did perform the condition precedent to the delivery of these bonds by constructing its railroad through
43 the county of Mercer within the meaning of the provisions of the act of the legislature and the terms of the subscription.

We have made no finding as to parol representation or promises alleged to have been made by the officers of the Louisville Southern Railroad Company before the election of December 4th, 1886, because we think all this testimony is incompetent, and the exceptions thereto are sustained.

We conclude the plaintiff should recover the amount of the coupons sued on, with interest from their respective maturities.

The bill of exceptions above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, Plaintiff, vs. COUNTY OF MERCER, Defendant.	Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause the defendant offered to prove and avowed that it could prove by divers witnesses that at the time the county of Mercer was being canvassed for the subscription in controversy, to induce the citizens to vote for the subscription, divers and sundry representations were made by

public addresses and conversations by persons favoring this subscription to the effect that it was the purpose of the company to build its line to the coal-fields in eastern Kentucky, passing through Mercer county, and through Lancaster, in Garrard county, and that there would be a great advantage to the county of Mercer in being so connected with the eastern coal-fields, in that it would bring fuel within the reach of the citizens of Mercer county at much cheaper rates than they were now paying; and avowed that it offered this evidence to show the contemporaneous construction of the parties upon the terms of the law requiring the railroad to be built through Mercer county. The plaintiff objected to this evidence and the court sustained the objection; to which ruling of the court defendant excepted and still excepts, and at the request of the defendant the court has signed this bill of exceptions and caused the same to be enrolled and to be filed and made a part of the record, which is now done.

(Signed) JNO. W. BARR, *Judge*.

44 The petition for a writ of error and assignment of errors above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
COUNTY OF MERCER, Defendant.

The County of Mercer, defendant herein, comes now and asks the court for writ of error herein from the judgment herein entered on the 30th day of April, 1895, and now assigns for error the following:

1. That the court erred in giving judgment for the plaintiff upon the special finding of *the* fact.

2. That the court erred in finding that the plaintiff was a *bona fide* holder for value and without notice of the coupons sued on or the bonds from which they were taken, or any of said bonds or any of said coupons.

3. That the court erred in refusing to find that the Louisville Southern Railroad Company had failed to comply with the conditions precedent to the validity of the said bonds.

4. That the court erred in failing to adjudge that under the act authorizing the subscriptions by Mercer County to the stock of the Louisville Southern Railroad Company the bonds from which the coupons were taken herein were void and of no effect, and that the coupons taken from said bonds were likewise void and of no effect.

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5. That the court erred in holding that Isaac Pearson, trustee, had the right to determine the question as to the performance by the Louisville Southern Railroad Company of the conditions precedent to the validity of said bonds.

6. That the court erred in holding that the County of Mercer was estopped to say that the said conditions had not been fulfilled, and was estopped to say that the said bonds were invalid and not binding.

7. That the court erred in refusing to admit the testimony offered and rejected as set forth in bill of exceptions.

And the petitioner, Mercer County, presents herein its
45–47 bond, conditioned according to law, and now asks that its writ of error be allowed and the bond approved.

J. B. THOMPSON,
HUMPHREY & DAVIE,
For Mercer County.

(The appeal bond was executed, a writ of error to the U. S. circuit court of appeals for the sixth circuit allowed, appearance entered thereto, and the cause was argued and submitted. The bond, writ of error, &c., are omitted from the printing per stipulation of counsel.)

48 And afterwards, to wit, on March 3, 1896, a judgment was entered upon the journal of said court in said cause, which judgment reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error, *vs.* THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Defendant in Error.	No. 326. Error to the Circuit Court of the United States for the District of Kentucky, at Louisville.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, and the cause is remanded to the court whence it came, with directions to enter a judgment in accordance with the opinion of this court.

49 And afterwards, on the same day, to wit, March 3, 1896, the following opinion was filed in said cause; which opinion reads and is in the words and figures following, to wit:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error, *vs.* THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Defendant in Error.	No. 326. Error to the Circuit Court of the United States for the District of Kentucky.

Submitted Oct. 30, 1895; decided March 3, 1896.

Before TAFT and LURTON, circuit judges, and SEVERENS, district judge.

The County of Mercer subscribed for stock in the Louisville Southern Railroad Company to the extent of $125,000.00 and issued in payment therefor 125 bonds, each for $1,000.00, dated January 10th, 1887, payable in 30 years, with interest payable semi-annually at five per cent., for which coupons were attached. These bonds, with past-due coupons detached, were received by the railroad company in August, 1888, and 100 of them subsequently came to the hands of the Provident Life & Trust Company.

This suit was brought upon four hundred coupons past due and unpaid. The county denied liability upon the bonds and presented a number of defenses, which, so far as now insisted upon, will be hereafter stated. A jury was waived and the decision of the law and facts submitted to the Hon. John W. Barr, district judge, holding the circuit court, who made a special finding of facts upon which he gave judgment against the county and for the plaintiff below. The bonds were in the usual form of negotiable county bonds. The only recital concerning the authority for their issuance is in these words:

"This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and

50 twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the County of

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Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the said Louisville Southern Railroad Company in the sum of one hundred and twenty-five thousand dollars ($125,000), which order was entered of record in said court on January tenth, A. D. eighteen hundred and eighty-seven (1887)."

The act granting power to subscribe for stock of the Southern Railroad Company, which is referred to in the recital above set out, was passed May 15th, 1886. The first section of that statute authorized Mercer County to subscribe to the capital stock of the Louisville Southern Railroad Company, " as hereinafter provided," and that it might pay for same in the " negotiable coupon bonds of said county." The second section provided the method of applying for a subscription and the manner in which a vote of the people should be taken upon the proposition for a subscription. The third and fourth sections were in these words:

" SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk."

" SEC. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road
51 through such county: Provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: and provided, fur-

ther, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

Among the facts specifically found by the circuit court and deemed essential to the proper decision of the questions now to be determined are these:

1. That all of the requirements, provisions, and conditions mentioned in sections 2 and 3 of the act of May 15, 1886, had been duly complied with.

2. That one D. L. Moore was selected and appointed trustee by an order of the county court of Mercer county, and entered into bond for the faithful performance of his duty under the act aforesaid, the bond being payable to the State of Kentucky for the use of Mercer county and the Louisville Southern Railroad Company.

3. That thereupon the bonds of the county, duly signed and sealed, as provided by section 3 of the act, were deposited with him to be held as provided in the act.

4. That July 3, 1888, said Moore, being unable to satisfy himself as to the proper discharge of his duties, tendered his resignation, which was accepted, and on the same day one Isaac Pearson was appointed trustee by the Mercer county court, who gave bond of like character to that which had been required from Moore.

5. Concerning the provision of section 3 of the act that the bonds thus deposited in escrow should not be valid obligations "until the railway of the said company shall have been so constructed through such county that a train of cars shall have passed over the same," the court found that the Louisville Southern Railroad Company had constructed a line of railway from the boundary line between Anderson and Mercer counties, thence to Harrodsburg; that there was a railroad known as the Southwestern railroad, which owned and operated a line between Harrodsburg and Burgin, in Mercer county, and that this piece of old road was consolidated with the Louisville Southern. At Burgin a junction was made with the Cincinnati Southern railroad, an independent corporation, whose line extended from Cincinnati to Chattanooga, Tennessee. The precise finding as to the location of Burgin, with reference to the nearest county line, was in these words:

52 "The nearest point to Mercer County line from the Southwestern railroad is two miles. I find that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of county, but that its railroad entered Mercer county on the line of said county next to the

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Anderson County — and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point.

"The railroad thus constructed gave a railroad connection by the Cincinnati Southern railroad either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee.

"I find that about the time of the passage of a train of cars of said road from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the tax-payers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him for his resignation as trustee.

"This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed. While this discussion was going on, and before Pearson, trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern railroad prepared to extend its railroad toward and to the town of Danville, Boyle county, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer County line.

"There was a movement made to have the court of claims of said county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the county judge, Hon. John W. Hughes, and of all of the justices of the peace of said county. The court, after argument, declined as a court to instruct the trustee as to his action, but, upon motion of one of the justices, they passed and had spread upon the records this resolution, viz:

53 "G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern railroad, but as individuals

they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle county line.

"And said motion being seconded, the ayes and nays were taken, and resulted as follows:

"Ayes, 12; nays, none; not voting, two."

6. The court found that thereafter "Pearson, trustee, decided that the conditions precedent had been performed by the Louisville Southern Railroad Company and was entitled to the delivery of $105,000 of the bonds of Mercer county."

7. The court further found that in August, 1888, said one hundred and five bonds were delivered to said railroad company in the presence of the county judge of Mercer county, who cut off and destroyed the past-due coupons thereon before delivery, and that there was then delivered to said county judge a certificate for $105,000 of the capital stock of the railroad company, which was accepted and subsequently voted at two meetings of stockholders of said company, and that this stock had never been returned or tendered to said railroad company.

8. The court further found "that said county of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds, and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1st, 1892, and have not paid any interest on said bonds since that time."

9. The court found that the plaintiff was a *bona fide* holder for value of the bonds mentioned to the extent of $100,000.00, with the coupons thereon, and had no knowledge or notice of any defects either in the execution or delivery of same, or of any defense the county has or might present to the recovery of the same.

LURTON, circuit judge, after making the foregoing statement of facts, delivered the opinion of the court:

The primary question which is to be decided is this: Were the bonds now held by the appellee corporation issued without authority of law, and in violation of the restrictions and conditions imposed by the act of May 15th, 1886, heretofore set out, and under which they purport to have been issued?

54 If they were issued in violation of the substantial provisions of the permissive act, they were void unless they have fallen into the hands of an innocent purchaser for value, and the requisite circumstances exist to constitute an estoppel precluding the county from showing that in fact they were issued in violation of law.

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Passing for the present all the conditions precedent to the actual preparation and formal execution of the bonds under the third section of the enabling act, we shall consider the terms and conditions imposed by the fourth section so far as the issuance of the bonds is affected by that section. Aside from the positive provision of the fourth section, it is evident upon obvious principles of law that these bonds when prepared and formally executed according to the provisions of the third section were invalid obligations as lacking the essential element of delivery, a step as necessary to the validity of a bond or other negotiable instrument as it is to the existence of a deed. 1 Dan. on Negotiable Instruments, sec. 63; Young *v.* Clarendon Township, 132 U. S., 353. But whatever doubt might exist as to the obligatory character of these bonds while still in the hands of the county officials who had prepared and signed them, the fourth section in clear terms resolves. No power to make delivery of the bonds was conferred upon the county judge or any other officer of the county, and all duty and power intrusted to them terminated with their formal execution, the act itself declaring that the bonds, thus apparently the formal contracts of the county, "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company."

The duty of the county judge with reference to these incomplete instruments pending compliance with the condition upon which they might become vital obligations by delivery was to "order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county." This last statutory duty was performed and the bonds were "deposited" with a trustee, to be held in escrow and delivered when the condition authorizing delivery had been performed. That condition was that the railroad of the Louisville Southern Railroad Company should be completed "through" the county of Mercer, so that a train of cars should have passed over the same. The defence of the county is that the railroad was
55 never constructed "through" the county, and that the trustee violated his duty and delivered them before that condition had been complied with. The finding of fact, touching immediately upon compliance with this condition, was "that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of the county, but that its

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railroad entered Mercer county on the line of said county next to Anderson county and ran through said county fifteen miles to Harrodsburg and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point." This finding seems to conclusively settle the question that the railroad company did not construct its railroad "through" the county. The requirement was that the road should be completed through the county, not through the county to Harrodsburg, or to Burgin, or to a junction with the Cincinnati Southern railroad, but through the county entirely—that is, from one side or line to the opposite or another side or line. If the legislature had used the very common preposition "through" in any limited or unusual sense it would appear in the context. That it was used with its ordinary meaning of "from one side to the opposite side," or another side, or "from one surface or limit to the other surface or limit," seems to us very plain from the whole tenor of the statute. That it was not used in the sense of "to" and "into" is plain, from the proviso of the same act, which brings the preposition- "to" and "through" into apposition, in the provision that "the subscription should not be binding," "unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The argument that this was a substantial compliance with the condition does not meet with our assent; the object of the act was to secure to Mercer county a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter, it is not for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition.

The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not
56 deliver them until this railroad should be constructed through the county are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the

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terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration.

The utterances of the Supreme Court upon the effect of restrictions and limitations in such legislation have been uniform and announce a wise public policy. In Barnum *vs.* Okolona, 148 U. S., 393, Mr. Justice Shiras for the court said:

"That municipal corporations have no power to issue bonds in aid of railroads except by legislative permission; that the legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose, and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Cheboygan County *vs.* Parker, 3 Wall., 93–96; Wells *vs.* Supervisors, 102 U. S., 625; Claiborne County *vs.* Brooks, 111 U. S., 400; Young *vs.* Clarendon Township, 132 U. S., 340–346."

In Barnett *vs.* Dennison, 145 U. S., 139, Mr. Justice Brown, in delivering the opinion of the court, said:

"The provision of the statute authorizing them must be strictly pursued, and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."

The conclusion we reach is that this condition has not been complied with, and that the trustee in delivering these bonds did so in violation of his duty and acted without authority of law.

This brings us to the consideration of the question as to whether the county is estopped to make this defence. The learned trial judge found as a fact that the appellee bought in open market, for value, and with no actual knowledge that the conditions imposed by the enabling act had been in any way unperformed.

That such a municipal corporation had no general authority to issue such negotiable securities, and that the purchaser is
57 chargeable with notice of the terms, conditions, and requirements of the permissive statutes under which they purport to be issued is well settled.

Marsh *v.* Fulton County, 10 Wall., 676.
McClure *v.* Township of Oxford, 94 U. S., 429.
Northern Bank *v.* Porter Township, 110 U. S., 609.
Barnett *v.* Dennison, 145 U. S., 139.
Barnum *v.* Okolona, 148 U. S., 395.
Citizens' Ass'n *v.* Perry County, 156 U. S., 701.

First, it is said that the recital in these bonds imports a compliance with all the restrictions and conditions of the enabling act and that these recitals cannot be contradicted. The recital in the bond is that it was "issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886." Looking to the act referred to, as the purchaser was bound to do, he discovered that these bonds were to be executed and deposited in escrow and delivered only upon the completion of the Louisville Southern railroad "through" the county of Mercer. By this provision he was advised that the recital that the bond "was issued pursuant to the authority" of the act referred to was a recital which in the nature of things could only refer to facts antecedent to the deposit of the bonds in escrow, and could not possibly operate as a recital covering the subsequent completion of the railroad through the county. The enabling act operated as notice to him that the bonds were not "binding and valid obligations" when placed in escrow, and would not become valid and legal securities "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." The purchaser therefore bought with notice that the depositary held the bonds "in escrow," and had no power to deliver them until the company should "become entitled to the same by the construction of its road through the county." The recitals in the bonds must therefore be referred to the acts which, under the permissive law, were to precede the execution and deposit of the bonds in escrow, and do not operate as a recital of facts which could not have existed when they were made.

Where recitals are relied upon to cut off the defence that municipal bonds are in fact issued without authority of law or in violation of law, they should be fairly and reasonably construed and be such as to clearly indicate that the conditions and requisites of the law had been complied with.

58 Risley *v.* Village of Howell, 64 Fed. Rpt., 453.
Northern Bank *v.* Porter Township, 110 U. S., 618–619.
School District *v.* Stone, 106 U. S., 183–187.

In the case last cited, Mr. Justice Harlan, for the court, concerning the construction of words in a bond claimed to operate as a recital estopping a municipality from showing that the bonds had been issued in violation of law, said:

"Numerous cases have been determined in this court in which

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we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of *bona fide* purchasers of value, to comport full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination would show, the recitals fairly import a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound policy forbids it. Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without the authority of law."

There is, therefore, no estoppel by recital, because there is no statement in the bonds implying that the Louisville Southern railroad had been completed "through" the county, as required by the provisions of the enabling act.

Buchanan *v.* Litchfield, 102 U. S., 278.
Carroll County *v.* Smith, 111 U. S., 561–2.
Lake County *v.* Graham, 130 U. S., 674.
Citizens' Ass'n *v.* Perry County, 156 U. S., 692–701.

We have then to deal with bonds which contain no recital whatever, implying that the most important of the conditions precedent, specified in the enabling act upon which the power to issue them depended, had been performed. In this respect the
59 case is distinguished from cases where the recitals were such as to imply compliance with all precedent conditions; such as that they had been "issued pursuant" to a particular act, as in Knox County *v.* Aspinwall, 2 How., 540, or "by virtue of the law of the State, entitled an act," etc., as in Insurance Co. *v.* Bruce, 105 U. S., 328, or "under and in pursuance of an act," etc., as in Lewis *v.* Commissioners, 105 U. S., 739, or "under authority of an act," etc., as in Oregon *v.* Jennings, 119 U. S., 74.

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This court, in Cadillac *v.* Woonsocket, 16 U. S. A., 545, held, that under an act authorizing the issuance of new bonds "to extend the time of payment of old bonds falling due," a recital that a bond was issued "for the purpose of extending the time of payment of bonds falling due," estopped the city from showing that the bonds thus refunded were void bonds. So in Risley *v.* Village of Howell, 12 C. C. A., 218, the bonds recited that they were issued under an act approved February 25, 1885, which act authorized the issuance of bonds "to raise money to make public improvements," it was held that it was not a defence to show that in fact the money obtained for the bonds had been expended under an ordinance, referred to in the bonds, for a purpose not a "public improvement," within the decisions of the supreme court of the State.

On the contrary, the case falls distinctly within another class of cases where the bonds either contained no recitals or the recitals were made by one not intrusted with the duty of ascertaining and determining the facts recited.

Dixon County *v.* Fields, 111 U. S., 83.
German Bank *v.* Franklin, 128 U. S., 526.
Barnett *v.* Dennison, 145 U. S., 139.
Citizens' Ass'n *v.* Perry County, 156 U. S., 701.

But it is argued that the Kentucky enabling act is peculiar, and that the absence of recitals in bonds issued thereunder is immaterial, inasmuch as the circumstances attending the execution of these bonds were such as that there could be no recitals, on the face of the bonds, importing performance of conditions which were to be complied with after their formal execution and deposit in escrow. This was the view entertained by Judge Barr, who, upon this ground, held that the decision of the trustee before delivering them to the railroad company, that all precedent conditions had been complied with, precluded the county from contradicting that decision after the bonds had passed into the hands of innocent purchasers. To support this position it is necessary to construe this enabling
60 act as not only empowering the trustee to ascertain and determine whether all conditions subsequent to such deposit had been performed, but that such determination should estop the county as against an innocent purchaser of the bonds, although no such determination appeared on the bond either through a recital or endorsement. Certainly none of the numerous opinions of the Supreme Court affords any express authority for such an interpretation of this act. A careful examination of the opinions of that court will, it is confidently believed, show that where railroad con-

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struction bonds have been issued in violation of the law under which authority was granted, the municipality has never been held estopped to defend upon that ground, unless representations appeared on the bonds themselves importing full compliance with the conditions imposed by the enabling act. The estoppel has been a consequence of recitals or endorsements made by officials empowered to decide the facts recited, and which a purchaser was authorized to rely upon as speaking the truth. The rule which we deduce from the long line of the decisions made by that court as to the application of the doctrine of estoppel to municipal bonds is, that where bonds are issued by a municipal corporation under a special and limited authority imposing restrictions and conditions, but authorizing officials of such municipality to execute and issue such bonds when the conditions precedent imposed have been complied with, and it can fairly and reasonably be gathered from the act that the officials so authorized to execute the bonds were also empowered to ascertain and determine that the requisite facts and circumstances did exist, or all conditions precedent had been complied with; and — this determination or decision has been embodied in the recitals of the bonds, a purchaser without other notice, and for value, would have a right to rely upon the truth of the representations appearing on the bond- and need make no further inquiry.

Colona *vs.* Eaves, 92 U. S., 484.
Dixon County *vs.* Fields, 111 U. S., 93.
German Bank *vs.* Franklin County, 128 U. S., 526.
Citizens' Ass'n *vs.* Perry County, 156 U. S., 701.

The principle is that when the bonds on their face affirmatively import a compliance with the conditions upon which they might lawfully issue, a defence, based upon a contradiction of the recitals thus made by an official empowered by the law to decide the facts recited, will not be permitted when the bond has come to the hands of a *bona fide* holder for value. This doctrine does not apply as between a railroad company receiving such bonds in violation
61 of law and the municipality itself; nor has it ever been applied in favor of a holder who was not an innocent purchaser for value.

Dillon on Municipal Corp., sec. 519.
Chambers County *vs.* Clews, 21 Wall., 317–321.

False recitals have never been held conclusive as between the original parties or in favor of purchasers with notice, for the obvious reason that an essential element to an estoppel *in pais* is that the

representation should mislead and deceive one who had a right to rely upon the truth of the representation. It would seem to follow, from the reasons upon which an estoppel is said to arise, that if bonds are issued with recitals, but in violation of law or authority, there exists no reason why they should not be open to defence when action is brought, even by one who bought without actual knowledge that they had been issued without performance of precedent conditions. In such case the purchaser buys at his peril, and cannot rely upon his mere ignorance, nor upon the mere fact that the bonds had been issued and were found in circulation.

Marsh *vs.* Fulton County, 10 Wall., 644.
Buchanan *vs.* Litchfield, 102 U. S., 278.
Merchants' Bank *vs.* Bergin County, 115 U. S., 384.
Davies County *vs.* Dickinson, 117 U. S., 637.
German Bank *vs.* Franklin County, 128 U. S., 526.
Carroll County *vs.* Smith, 111 U. S., 556.
Chambers County *vs.* Clews, 21 Wall., 317–321.
Citizen's Ass'n *vs.* Perry County, 156 U. S., 701.
Barnett *vs.* Dennison, 145 U. S., 135.

The mere fact that the bonds have been issued and are in form negotiable securities, if entitled to any significance whatever, would only raise a presumption that they had been delivered to the railroad company by the trustee in compliance with the terms of the law. Such a presumption would not be conclusive and the county would not be estopped, even as against one who bought in actual ignorance of the true facts. This seems to be the well-settled rule established by Buchanan *vs.* Litchfield; Davies County *vs.* Dickinson; German Bank *vs.* Franklin County, and Citizens' Ass'n *vs.* Perry County, heretofore cited.

In the case last cited this precise point was urged. Justice Harlan, for a unanimous court, in answer said:

"But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them, whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a *bona fide* purchaser for value.
62 This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against *bona fide* holders for value. But this court, in Buchanan *vs.* Litchfield, 102 U. S., 278–292, upon full consideration, held that the mere fact that the bonds were issued, without any re-

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cital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued."

Does the act under which these bonds were issued so far depart from the statutes construed in the cases cited as to warrant us in holding that a purchaser need make no further inquiry than would lead him to information that the trustee had made such a decision as that found by the circuit court, and that if he buys without any inquiry, that he is only obliged to prove by evidence extraneous to the bond that such a decision was in fact made? Unless this act can be construed as making the power of the county to issue these bonds dependent, not on the actual construction of this railroad through the county, but upon the decision of this trustee that it had been so constructed, the whole foundation for the argument disappears. This is the test to be applied to every case, even where recitals are relied upon to defeat a defence.

In the leading case of Dixon *v.* Field, 111 U. S., 93, the rule for construction of such enabling act is thus stated by Mr. Justice Matthews:

"But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital
63 of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect."

It is to be observed at the outset that it is significant that while the act provides in very plain language that the requisite facts antecedent to the preparation and deposit of the bonds with the trustee shall be ascertained and determined by the county judge, that no such explicit statement is found regarding the determination of the subsequent precedent conditions by this trustee. If he is empowered

to make any determination whatever, the power is only inferentially granted. So it is significant that no provision is found requiring an endorsement of such decision on the bonds, or the making of some other permanent record that so grave a determination had been made. The very failure to provide in clear terms for a determination by this trustee of the existence of conditions which could only arise after the county judge had parted with the bonds and lost all control over them, and to provide for some method of certifying that determination affords a strong presumption against the interpretation now contended for. Especially is this noticeable in view of the very well-defined distinction between bonds with and without recitals. But it is said that the act authorizing the making of "negotiable bonds," and that it ought not to be presumed that the legislature intended that "negotiable bonds" should be forever open to the defence that the railroad had never been completed as required by the act, and that we ought therefore to infer that the trustee was authorized to decide as to whether that had been a compliance with this condition, and that his decision should be conclusive.

Undoubtedly the commercial value of such bonds would be much improved if the mere fact of their issuance should, in favor of innocent holders, be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. This, however, is not the law. If the legislature by providing that these bonds should be negotiable meant to cut off all defences by the decision of the county judge as to facts antecedent to the deposit in escrow, and by the decision of the trustee as to all facts subsequent to such deposit, it is most remarkable that it did not provide for some endorsement of that decision on the bonds. As it is, the fact that he ever made such a decision depends upon evidence *in pais*, and is subject to all the dangers of such evidence. The argument based on the inconvenience of making proof in every action on such bonds of the fact of the completion of the railroad amounts to little in ar-
64 riving at the meaning of this act, if the litigant in such a suit is driven to make proof of a decision by the trustee by evidence equally difficult to preserve. But this provision authorizing the issuance of "negotiable bonds" must not be construed alone, nor merely in connection with the provision that the trustee should deliver them when the railroad was completed. There are many considerations which lead us to the conclusion that while it was undoubtedly the duty of this custodian to inform himself as to the existence of the facts which would justify him in making a delivery of these bonds, yet that information was only for the purpose of en-

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abling him to prudently discharge his duty and protect himself and the parties interested from the consequence of an illegal and unauthorized delivery. The power of this depositary to receive, hold, and deliver these bonds came from the enabling act alone. He was not constituted the agent of either the railroad company or the county, though he was designated by an order of the county judge. This depositary need not have been a person at all. A corporate trust company might have been designated. Neither residence, citizenship, nor interest in or knowledge of the locality was essential to the competency of the appointee. The relation, therefore, that this depositary bore to the county is not of such a character as to lead to the presumption that it was intended that he should conclude the county through any agency for or relation to it. The bonds were not to be "delivered" to him, but "deposited" with him. Delivery is just as essential to the existence of a bond, note, or other negotiable instrument as it is to a deed.

1 Dan. Negotiable Instruments, sec. 63 *et seq.*

Young *v.* Clarendon Township, 132 U. S., 353.

Though they had been prepared and signed they were absolute nullities until delivered, and they could not take effect as bonds until an authorized delivery. When prepared and signed by the county judge and clerk and sealed the power of these officials ceased. They could not perfect them by delivery, because the statute gave them no such power. What the county judge then did was to deposit them with the depositary provided under the statute. This was not a delivery, and the bonds continued imperfect obligations until a delivery, which could only be made by the custodian when the railroad was completed. The power to perfect them as bonds arose only when the condition mentioned had been performed. A delivery before the railroad was begun would not have completed the making of these bonds, for the power was to deliver them when it was
65 finished, and the act itself provided expressly that until then the bonds should not be valid, thus affirming the imperfect character of the bonds until a delivery was lawfully made.

Young *v.* Clarendon Township, cited above.

The imperfect character of the bonds until the condition precedent had been performed is further made manifest by the direction of the act that they should "be held in escrow and delivered to the said railroad company when it shall become entitled to them by the construction of its road through such county." This term, "in escrow," is one strictly applicable to deeds; and a direction that such imperfect obligations, executed subject to conditions and restrictions, by a

maker having no general authority to issue such paper, should be held in escrow, implies that the term was used just as it would be used if the subject-matter of the deposit was a deed. As used, the term implied the state or condition of a deed conditionally held by a third person, to be delivered and to take effect upon the happening of a condition.

Bouvier's Law Dictionary.
Black's Law Dictionary.

When a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed.

Calhoun *v.* Emigrant Comp., 93 U. S., 124.
6 Am. and Eng. Ency., 867.
Taylor *v.* Craig, 2 J. J. M. (Ky.), 449.

Counsel have very ably argued that a distinction exists between the effect of a delivery in violation of the conditions where the thing in escrow was negotiable paper and has come to the hands of an innocent purchaser without notice and for value.

1 Dan. Neg. Instruments, secs. 68, 855, 856.
Taylor *v.* Craig, 2 J. J. M. (Ky.), 449.

Possibly such distinction is sound, though if the purchaser bought with notice that the paper had been held in escrow, and that the trustee had no power to deliver until a condition had arisen, of which the purchaser likewise had notice, he could hardly be regarded as a *bona fide* holder. Every one dealing with an agent assumes all the risk of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. The purchaser of these bonds bought with notice that they had been held in escrow. The authority of the custodian was not a secret. Herein is the distinction between this case and that class of cases where paper is fraudulently issued by an agent who is authorized to make and issue negotiable paper in the business of his prin-
66 cipal, and the question whether the paper issued is in the business of the principal is peculiarly within the knowledge of the agent and not known to the world or a stranger. In such cases the agent is impliedly authorized to represent the existence of the fact upon which his agency depends. Farmers' National Bank *vs.* Sutton Mfg. Co., 6 U. S. App., 312, 332. It is difficult to see why one who takes such bonds as those in suit is not just as much obliged to look to the authority of the trustee to deliver as if the subject of the escrow had been a deed. We are to remember that these bonds were imperfect obligations, there having been no "delivery" when

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placed in escrow. The question first presented to an intending buyer is this: Have these bonds become executed, valid obligations by delivery?

The authority of this trustee to make delivery depended upon the same principles that determine such authority in other contracts, "and is not aided by the doctrine that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders."

The Floyd Acceptances, 74 U. S., 666–680.

"The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder."

Marsh *v.* Fulton County, 77 U. S., 683.

But aside from any distinction between the effect of a wrongful delivery of a deed and of commercial paper upon the title of an innocent purchaser, it seems very clear that the express declaration of the fourth section of the act that these bonds should not be valid obligations until the railroad had been completed through the county, and by the further provision that they should be held in escrow until that event, settles conclusively that the legislature did not mean that the power of the county to so obligate itself should depend upon the mere opinion of the custodian, but upon the actual objective existence of the requisite fact. The whole scope and tenor of the act leads to the conclusion that the legislature intended to protect the county against any misapplication of these bonds, and therefore limited its power so that the bonds only became its obligations when the contract between the railroad company and the county should become complete.

The machinery devised indicates that the purpose was that the railroad should not part with its stock certificates until it had received payment therefor. And to secure the county against failure to complete the road, all power to issue bonds was made de-
67 pendent upon its actual construction. To secure the railroad in obtaining the bonds when actually earned, it was provided that when a favorable vote had been cast and the subscription made the bonds should be prepared and formally executed and placed in the hands of a stakeholder, to be delivered when the railroad company had performed its agreement. To secure the county against the possible breach of duty by this custodian, his holding was to be in escrow, and his power to deliver withheld until the actual performance of all precedent conditions. To further protect the county against an unauthorized delivery of the bonds, the act in plain terms provided that they should not be valid obligations until the comple-

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tion of the road. That the custodian was required to give a bond for the due discharge of his trust by no means implies that the county was to look to this bond in case of an unauthorized delivery. The bond was no more for the benefit of one party than the other. A wrongful delivery or a fraudulent use of them might, irrespective of a defence if sued upon the bonds, involve a costly litigation. It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement or any wilful refusal to faithfully perform the trust.

It is next insisted that the county should be held responsible upon the principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This principle can have no application here, for two reasons: first, the holders of these bonds cannot be regarded as innocent purchasers, inasmuch as they are constructively chargeable with all that inquiry would have disclosed; and, second, the bonds, as bonds of a municipal corporation, are invalid for want of power to issue them until the actual completion of the railroad in whose aid they were authorized. Neither are the bonds validated because of the payment of interest for a time after their issuance. The question here is not one of mere irregularity in the method of exercising a power. The defence presented goes to the power of the county. There was no authority to issue bonds in aid of the railroad until the road had been constructed through the county. That condition having never been complied with, neither the county court nor the county judge could, by any act of omission or commission, waive its performance. Neither could the county court or any of the county officials validate them by subsequent acts of ratification. If the power to issue them did not exist when they were issued, no payment of interest or resolution to adopt them can operate to make them valid contracts. Ratification can only be effective when the party ratifying possesses the power to perform the act ratified.

68–86

Marsh *v.* Fulton County, 77 U. S., 676–684.

Norton *v.* Shelby County, 118 U. S., 425–451.

In Doon Township *v.* Cummins, 142 U. S., 366–376, the court, through Mr. Justice Gray, said:

"A ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest or otherwise."

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That the county still holds the railroad stock received when these bonds were delivered is no reason for holding these bonds valid. By proper proceedings the railroad can recover this stock or compel payment for its value. Justice would demand the return of the stock or compensation for its value. No such question exists in this case.

Norton *v.* Shelby County, 118 U. S., 454.

The judgment must be reversed and remanded, with direction to render judgment in accordance with this opinion.

(A petition for a rehearing (which is omitted per stipulation) was duly filed, which was, on May 25th, 1896, denied without an opinion.)

87 [Endorsed:] Case No. 16,401. Supreme Court U. S., October term, 1897. Term No., 243. The County of Mercer, in the State of Kentucky, P. E., *vs.* The Provident Life & Trust Company of Philadelphia. Agreed record. Filed July 8, 1897.

88 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The County of Mercer, in the State of Kentucky, is plaintiff in error and The Provident Life and Trust Company of Philadelphia is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

89 do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

BLEED

THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit. }

I hereby make return of the within writ, pursuant to a stipulation of counsel filed in this court this 24th day of October, 1896; which stipulation is in the following words:

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error,
vs.
THE PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA, Defendant in Error.
} No. 326 of October Term, 1895.

Stipulation.

A writ of certiorari having been granted on October 20th, 1896, by the Supreme Court of the United States, directed to the honorable judges of the United States circuit court of appeals for the sixth circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-styled cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done: Now it is stipulated and agreed by and between the County of Mercer, in the State of Kentucky, by Alexander Pope Humphrey, its counsel, and the Provident Life & Trust Co. of Philadelphia, by Thomas W. Bullitt, its counsel, as follows, to wit:

That the certified copy of the transcript of the record and proceedings in the above-styled cause in said circuit court of appeals, which is now on file in the said Supreme Court of the United States with the petition of the Provident Life & Trust Co. of Philadelphia for said writ of certiorari, may be taken and considered as a return to the said writ.

October 23rd, 1896.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
By ALEXANDER POPE HUMPHREY,
Counsel for Plaintiff in Error.
THE PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA,
By THOMAS W. BULLITT,
Counsel for Defendant in Error.

THROUGH POOR COPY

Done at Cincinnati, O., this 24th day of October, 1896.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

90 [Endorsed:] 16,401. Supreme Court of the United States. No. 243. October term, 1897. The County of Mercer, Kentucky, *vs.* The Provident Life & Trust Co. of Phila. Writ of certiorari and return. Filed Oct. 26, 1896.

IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1895.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - *Plaintiff in Error.*

VERSUS [No. 326.]

THE PROVIDENT LIFE AND TRUST COMPANY, OF PHILADELPHIA, - *Defendant in Error.*

NOTICE.

Notice is hereby given that upon the verified petition of the Provident Life and Trust Company of Philadelphia, defendant in error in the above cause, and upon all the pleadings and proceedings herein, we shall on Monday the 12th day of October, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is herewith served upon you) to the Supreme Court of the United States at the Capitol, in the city of Washington, D. C.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Of Counsel for the Provident Life and Trust Company, of Philadelphia.

The foregoing notice is hereby accepted this 14th day of September, 1896.

THE COUNTY OF MERCER IN THE STATE OF KENTUCKY.
BY ALEXANDER POPE HUMPHREY,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

MOTION.

And now comes the Provident Life and Trust Company of Philadelphia, by Samuel Dickson and Thomas W. Bullitt, its counsel, and moves this Honorable Court that it shall by *Certiorari* or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the County of Mercer, in the State of Kentucky, was plaintiff in error and the Provident Life and Trust Company of Philadelphia was defendant in error, and to that end now tenders herewith its petition together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Counsel for Provident Life and Trust Company of Philadelphia.

BLEED.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

PETITION.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE WRIT OF ERROR TAKEN BY THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, V. THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, A CORPORATION OF THE STATE OF PENNSYLVANIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Provident Life and Trust Company of Philadelphia, respectfully represents as follows:

First. Your petitioner is a corporation of the State of Pennsylvania, and the County of Mercer is a county in the State of Kentucky.

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Second. An action was brought by your petitioner in the Circuit Court of the United States for the District of Kentucky at Louisville, upon the coupons annexed to $100,000 of bonds issued by the County of Mercer. The case was heard (under a stipulation waiving a jury) before the Hon. JOHN W. BARR as Circuit Judge, who made a special finding of facts, which is at pp. 17–36 of the copy of the record herewith filed; and upon the facts so found gave judgment against the County of Mercer as prayed in the petition. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

Third. The case having been heard before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge, the opinion of the Court was delivered on March 3, 1896, by LURTON, C. J., reversing the judgment of the lower court upon the ground that the bonds were void. (R., pp. 49–68). A petition for a rehearing or for a certificate to the Supreme Court was duly filed (Rec. pp. 69–85); and was denied without an opinion. (Rec. p. 86.)

BLEED.

Fourth. The County of Mercer subscribed to the capital stock of the Louisville Southern Railroad Company in pursuance of an Act of the General Assembly of the State of Kentucky, as follows:

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascer-

THROUGH POOR COPY

tain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to

receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

An election was duly held and pursuant to the authority given the County subscribed for $125,000 of the capital stock of the Railroad Company, and caused 125 bonds to be executed in the following form:

HROUGH POOR COPY

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and *pursuant to an order* entered by the county judge of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"*County Judge.*

"Attest:

"BEN. C. ALLIN,

"*Clerk.*"

Fifth. These bonds were deposited (in accordance with the provisions of the fourth section of the Act) with a trustee who duly

THROUGH POOR COPY

gave bond in manner and form as required by the Act. (Rec. p. 24.)

The railroad was not completed from one line of the county through to another or opposite line, but was completed through the county about twenty miles to a point where a junction was made with the Cincinnati Southern R. R. Co., approaching within two miles of the opposite county line. (Rec. p. 29.)

Sixth. A question having arisen as to whether the road should be built from one county line to the opposite one, the railroad company prepared to extend its road to Danville in Boyle County, and acquired the right of way to the Boyle County line. The citizens of Mercer County were violently opposed to the road being extended to Danville, which was a rival town. The matter was publicly and generally discussed and a movement made to have the County Court instruct the trustee to deliver the bonds. (Rec. pp. 29-30.)

After full argument, the County Court, composed of the County Judge and the magistrates of the county, while disclaiming the right to

order the trustee to deliver the bonds, by an unanimous vote entered an order expressing the opinion that the bonds should be delivered by the trustee and the construction of the railroad not forced to the Boyle County line and to Danville. This order was spread upon the county records. (Rec. pp. 30-31.)

Seventh. The trustee *decided* that all the conditions precedent had been performed by the railroad company, to wit: that the railroad had been so completed through the county that a train of cars had passed over the same within the time limited by the subscription contract. He delivered $105,000 of the bonds in the presence of the County Judge, who cut off and destroyed the past due coupons and received a certificate for $105,000 of the capital stock of the railroad company. (Rec. pp. 30, 31.)

Eighth. The county continually voted said stock, now holds the same, and has never tendered its return. The county regularly paid the coupons until the expiration of the time (allowed by the contract of subscription) within

which the road was to be completed through the county. (Rec. pp. 31, 32.)

Your petitioner bought the bonds and paid par and accrued interest therefor ($101,197.22) to a prior purchaser in the city of Philadelphia; and, as specially found by the lower court, is a *bona fide* purchaser without notice of any defect in or defense to the said bonds. (Rec. p. 35.)

Ninth. The Circuit Court of Appeals held the bonds to be void because the railroad was not completed from one county line entirely through to the opposite county line. (Rec. pp. 55, 56.)

It held that the county of Mercer was not estopped to contest the validity of the bonds even in the hands of a *bona fide* holder, *because*,

1. The trustee had no power to *decide* any thing as to the performance of the conditions precedent; but each purchaser of the bonds was bound to find out at his peril the physical fact whether the road had been completed through the county, and whether a train of cars had passed over the same *prior to a certain day*. (Rec. p. 63.)

2. That even if the Act be construed as vesting the trustee with the power to decide as to the performance of the conditions precedent, the decision of the trustee in the present case is ineffectual because it is not recited in or *endorsed* on the bonds. (Rec. p. 60.)

Although the bonds recited that they had "been issued pursuant to the authority conferred upon the said county by an Act, etc.," and the county consented and urged that they be delivered with such a recital, the Circuit Court of Appeals held that the county was not thereby estopped to defend against even a *bona fide* holder; nor estopped by the payment of interest, nor by lying by till the time for completion had expired, nor by the holding and voting of the shares of stock received for the bonds. (Rec. pp. 67, 68.)

Your petitioner respectfully represents:

1. The decision of the Circuit Court of Appeals involves the validity of a very large class of securities which have been given currency in the markets of the world,

almost entirely by the decisions of this Court, and such securities, in this and other circuits, are profoundly and most injuriously affected by the decision complained of.

2. The amount involved in this controversy is large, viz., $100,000 of municipal bonds (with several years' accrued interest) purchased, at par, on the faith of the decisions of this Court, and will be a total loss under the decision of the Circuit Court of Appeals.

3. The decision is, in fundamental particulars, a distinct departure from a course of decision now firmly settled by this Court with reference to the construction of statutes authorizing the issue of "negotiable" municipal bonds.

4. It rests upon principles so clearly and so deeply in conflict with the decisions of this Court, that if permitted to become final and followed in other circuits, vast lines of securities now deemed perfectly safe must be declared void; confidence in municipal bonds as an investment will be destroyed, and great losses must be borne by persons who have

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invested on the faith of the decisions of this Court.

5. The statute authorizes the issue of "negotiable" bonds upon the performance of certain conditions precedent, which are matters not of record, but purely *in pais*.

That can not be a reasonable or just construction of such an Act, which holds that, in no way, and at no time, can the bonds so authorized ever in fact become negotiable; but that such bonds are, by the requirements of the Act itself, to be subject to contest until maturity, although purchased in good faith, in open market, for full value, after delivery made in good faith in the presence of the county officials, by the custodian designated by the Act to make delivery and required to give bond for the faithful performance of this very duty. Yet such is the effect of the opinion complained of.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the

ED. THROUGH POOR COPY

Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled County of Mercer, in the State of Kentucky, plaintiff in error, v. Provident Life and Trust Company of Philadelphia, defendant in error, No. 326, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And so your petitioner will ever pray.

SAMUEL DICKSON,

THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company of Philadelphia, Petitioner.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON, } ss.

Thomas W. Bullitt, being duly sworn, states that he is one of the counsel for the Provident Life and Trust Company of Philadelphia, the petitioner above named, that he has read the foregoing petition, and that the facts therein stated are true.

THOMAS W. BULLITT.

Subscribed and sworn to before me this 22d day of September, 1896.

WILLIAM MARSHALL BULLITT,

[SEAL] *Notary Public in and for the County of Jefferson, State of Kentucky.*

My commission expires February 4, 1900.

BLEED. THROUGH POOR COPY

No. 622. 243.

Brief of Dickson & Bullitt for P. C. (Def'ts)

Filed Oct. 12, 1896.

Office Supreme Court, U. S.
FILED.
OCT 12 1896
JAMES H. MCKENNEY,
CLERK

MERCER COUNTY BOND CASE.

Supreme Court of the United States

OCTOBER TERM, 1896.

EX-PARTE

The Provident Life and Trust Company, of Philadelphia,

PETITIONER.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF THE PETITION.

SAMUEL DICKSON,
THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company, of Philadelphia, Petitioner.

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IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1895.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - *Plaintiff in Error.*

VERSUS [No. 326.]

THE PROVIDENT LIFE AND TRUST COMPANY, OF PHILADELPHIA, - *Defendant in Error.*

NOTICE.

Notice is hereby given that upon the verified petition of the Provident Life and Trust Company of Philadelphia, defendant in error in the above cause, and upon all the pleadings and proceedings herein, we shall on Monday the 12th day of October, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is herewith served upon you) to the Supreme Court of the United States at the Capitol, in the city of Washington, D. C.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Of Counsel for the Provident Life and Trust Company, of Philadelphia.

The foregoing notice is hereby accepted this 14th day of September, 1896.

THE COUNTY OF MERCER IN THE STATE OF KENTUCKY.
BY ALEXANDER POPE HUMPHREY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

MOTION.

And now comes the Provident Life and Trust Company of Philadelphia, by Samuel Dickson and Thomas W. Bullitt, its counsel, and moves this Honorable Court that it shall by *Certiorari* or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the County of Mercer, in the State of Kentucky, was plaintiff in error and the Provident Life and Trust Company of Philadelphia was defendant in error, and to that end now tenders herewith its petition together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Counsel for Provident Life and Trust Company of Philadelphia.

BLEED. THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

PETITION.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE WRIT OF ERROR TAKEN BY THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, V. THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, A CORPORATION OF THE STATE OF PENNSYLVANIA.

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The petition of the Provident Life and Trust Company of Philadelphia, respectfully represents as follows:

First. Your petitioner is a corporation of the State of Pennsylvania, and the County of Mercer is a county in the State of Kentucky.

Second. An action was brought by your petitioner in the Circuit Court of the United States for the District of Kentucky at Louisville, upon the coupons annexed to $100,000 of bonds issued by the County of Mercer. The case was heard (under a stipulation waiving a jury) before the Hon. JOHN W. BARR as Circuit Judge, who made a special finding of facts, which is at pp. 17–36 of the copy of the record herewith filed; and upon the facts so found gave judgment against the County of Mercer as prayed in the petition. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

Third. The case having been heard before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge, the opinion of the Court was delivered on March 3, 1896, by LURTON, C. J., reversing the judgment of the lower court upon the ground that the bonds were void. (R., pp. 49–68). A petition for a rehearing or for a certificate to the Supreme Court was duly filed (Rec. pp. 69–85); and was denied without an opinion. (Rec. p. 86.)

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Fourth. The County of Mercer subscribed to the capital stock of the Louisville Southern Railroad Company in pursuance of an Act of the General Assembly of the State of Kentucky, as follows:

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascer-

tain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to

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receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

An election was duly held and pursuant to the authority given the County subscribed for $125,000 of the capital stock of the Railroad Company, and caused 125 bonds to be executed in the following form:

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and *pursuant to an order* entered by the county judge of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

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"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"Attest: "*County Judge.*

"BEN. C. ALLIN,

"*Clerk.*"

Fifth. These bonds were deposited (in accordance with the provisions of the fourth section of the Act) with a trustee who duly

gave bond in manner and form as required by the Act. (Rec. p. 24.)

The railroad was not completed from one line of the county through to another or opposite line, but was completed through the county about twenty miles to a point where a junction was made with the Cincinnati Southern R. R. Co., approaching within two miles of the opposite county line. (Rec. p. 29.)

Sixth. A question having arisen as to whether the road should be built from one county line to the opposite one, the railroad company prepared to extend its road to Danville in Boyle County, and acquired the right of way to the Boyle County line. The citizens of Mercer County were violently opposed to the road being extended to Danville, which was a rival town. The matter was publicly and generally discussed and a movement made to have the County Court instruct the trustee to deliver the bonds. (Rec. pp. 29-30.)

After full argument, the County Court, composed of the County Judge and the magistrates of the county, while disclaiming the right to

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order the trustee to deliver the bonds, by an unanimous vote entered an order expressing the opinion that the bonds should be delivered by the trustee and the construction of the railroad not forced to the Boyle County line and to Danville. This order was spread upon the county records. (Rec. pp. 30-31.)

Seventh. The trustee *decided* that all the conditions precedent had been performed by the railroad company, to wit: that the railroad had been so completed through the county that a train of cars had passed over the same within the time limited by the subscription contract. He delivered $105,000 of the bonds in the presence of the County Judge, who cut off and destroyed the past due coupons and received a certificate for $105,000 of the capital stock of the railroad company. (Rec. pp. 30, 31.)

Eighth. The county continually voted said stock, now holds the same, and has never tendered its return. The county regularly paid the coupons until the expiration of the time (allowed by the contract of subscription) within

which the road was to be completed through the county. (Rec. pp. 31, 32.)

Your petitioner bought the bonds and paid par and accrued interest therefor ($101,197.22) to a prior purchaser in the city of Philadelphia; and, as specially found by the lower court, is a *bona fide* purchaser without notice of any defect in or defense to the said bonds. (Rec. p. 35.)

Ninth. The Circuit Court of Appeals held the bonds to be void because the railroad was not completed from one county line entirely through to the opposite county line. (Rec. pp. 55, 56.)

It held that the county of Mercer was not estopped to contest the validity of the bonds even in the hands of a *bona fide* holder, *because*,

1. The trustee had no power to *decide* any thing as to the performance of the conditions precedent; but each purchaser of the bonds was bound to find out at his peril the physical fact whether the road had been completed through the county, and whether a train of cars had passed over the same *prior to a certain day*. (Rec. p. 63.)

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2. That even if the Act be construed as vesting the trustee with the power to decide as to the performance of the conditions precedent, the decision of the trustee in the present case is ineffectual because it is not recited in or *endorsed* on the bonds. (Rec. p. 60.)

Although the bonds recited that they had "been issued pursuant to the authority conferred upon the said county by an Act, etc.," and the county consented and urged that they be delivered with such a recital, the Circuit Court of Appeals held that the county was not thereby estopped to defend against even a *bona fide* holder; nor estopped by the payment of interest, nor by lying by till the time for completion had expired, nor by the holding and voting of the shares of stock received for the bonds. (Rec. pp. 67, 68.)

Your petitioner respectfully represents:

1. The decision of the Circuit Court of Appeals involves the validity of a very large class of securities which have been given currency in the markets of the world,

almost entirely by the decisions of this Court, and such securities, in this and other circuits, are profoundly and most injuriously affected by the decision complained of.

2. The amount involved in this controversy is large, viz., $100,000 of municipal bonds (with several years' accrued interest) purchased, at par, on the faith of the decisions of this Court, and will be a total loss under the decision of the Circuit Court of Appeals.

3. The decision is, in fundamental particulars, a distinct departure from a course of decision now firmly settled by this Court with reference to the construction of statutes authorizing the issue of "negotiable" municipal bonds.

4. It rests upon principles so clearly and so deeply in conflict with the decisions of this Court, that if permitted to become final and followed in other circuits, vast lines of securities now deemed perfectly safe must be declared void; confidence in municipal bonds as an investment will be destroyed, and great losses must be borne by persons who have

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invested on the faith of the decisions of this Court.

5. The statute authorizes the issue of "negotiable" bonds upon the performance of certain conditions precedent, which are matters not of record, but purely *in pais*.

That can not be a reasonable or just construction of such an Act, which holds that, in no way, and at no time, can the bonds so authorized ever in fact become negotiable; but that such bonds are, by the requirements of the Act itself, to be subject to contest until maturity, although purchased in good faith, in open market, for full value, after delivery made in good faith in the presence of the county officials, by the custodian designated by the Act to make delivery and required to give bond for the faithful performance of this very duty. Yet such is the effect of the opinion complained of.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the

Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled County of Mercer, in the State of Kentucky, plaintiff in error, v. Provident Life and Trust Company of Philadelphia, defendant in error, No. 326, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And so your petitioner will ever pray.

SAMUEL DICKSON,

THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company of Philadelphia, Petitioner.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON, } ss.

Thomas W. Bullitt, being duly sworn, states that he is one of the counsel for the Provident Life and Trust Company of Philadelphia, the petitioner above named, that he has read the foregoing petition, and that the facts therein stated are true.

THOMAS W. BULLITT.

Subscribed and sworn to before me this 22d day of September, 1896.

WILLIAM MARSHALL BULLITT,

[SEAL] *Notary Public in and for the County of Jefferson, State of Kentucky.*

My commission expires February 4, 1900.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1896.

EX PARTE—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, - - PETITIONER.

Brief in Support of the Application for a Writ of Certiorari.

This action involves the validity of $100,000 of negotiable bonds issued by the County of Mercer, State of Kentucky.

The application for *certiorari* is made with full recognition of the fact that the Circuit Courts of Appeals were established for the relief of the Supreme Court, and that to a large extent it is the policy of the law that they shall be treated as courts of last resort. But this court is given power to review their action, and it is believed that the case at bar is one which calls for the exercise of the discretion expressly conferred.

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Excepting real estate, it is probable that negotiable corporate bonds constitute the largest investments in this country. Of these, municipal bonds are the more important, as they are the favorite investment of those unskilled in business, who rely upon their public or governmental character as a voucher for their safety. To a vast extent they are held by non-residents of the States under whose authority they have been issued.

The validity of such bonds has been frequently tested in this court. The result is a long line of opinions wherein rules of clear and easy application have been laid down for the guidance of purchasers of municipal bonds. These decisions have been so lucid, so forcible, and so consistent that they might well be regarded as constituting a **rule of property** in respect to such bonds. They have given a credit to securities of this character which would never have resulted from the judgments of the State courts, and investors uniformly purchase on the faith of the decisions of this court.

A departure from or a disregard by the Cir-

cuit Courts of Appeals of the rules established by this court, followed by a refusal of this court, on any ground of general policy, to review their decisions, must give a great shock to this class of securities. The opinions of Circuit Judges may and doubtless will differ in the construction and application of the decisions of this court, and the validity of municipal and corporate bonds will at last come to depend upon the Circuit in which their validity may be tested. Perhaps a greater and more obvious danger is, that the decision complained of will be generally accepted in the other circuits, and that the law as declared by this court will be thus in effect completely altered by the Courts of Appeals.

We submit that the vast lines of securities which have been issued and purchased on the faith of the decisions of this court, should not now be left to the uncertainties involved in the conflicting opinions of any other court whatever. On the faith of those decisions the bonds involved in this controversy were purchased; it is believed that, tested by those decisions, they are valid securities.

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That the Circuit Court of Appeals, in declaring them void, has departed from and disregarded certain settled rules of statutory construction announced by this court, we now undertake to establish. If correct in this view, the case falls clearly within the reason announced by this court as a proper ground for issuing a *certiorari*, viz: "Where questions of gravity and importance are involved or in *the interest of uniformity of decision.*" *Lau. Ow. Bew.* v. *U. S.* 144 U. S. 47, 58; *American Const. Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, 383.

The following we submit is a correct and full statement (in so far as applicable to this controversy) of the

RULES OF STATUTORY CONSTRUCTION SETTLED BY THE SUPREME COURT.

I.

All persons dealing with municipal bonds are charged with notice of the **Constitution** and **Statutes** of the State under the authority of which such bonds purport to be issued.

Knox v. *Aspinwall*, 21 How. 539, 544.
Lake County v. *Graham*, 130 U. S. 674, 680.
Barnett v. *Denison*, 145 U. S. 135, 139.

II.

In every case of statutory authority to issue *negotiable* municipal bonds, it will (in the absence of express words to the contrary) be **conclusively presumed** that the statute **intends to establish** and does establish some standard of evidence or some authority whereby a purchaser may **ascertain clearly and authoritatively, at the time of the purchase,** whether the conditions existed or have been performed which justify their lawful issue.

The absence of such a provision in a statute would nullify its declaration that the bonds are to be "negotiable."

Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 487, 488.

III.

If the authorizing statute shall (in lieu of the decision of some officer or tribunal) designate some fixed **standard of evidence** on the subject, such as a **public record** or the

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like, then purchasers of bonds are bound to resort for information to such **standard of evidence** and can not plead as against the municipality, either representations by its officers or a decision by any alleged tribunal.

Sutliff v. *Lake County Com'rs*, 147 U. S. 230, 235.
Dixon Co. v. *Field*, 111 U. S. 83, 93.
Lake County v. *Graham*, 130 U. S. 674, 683, 684.
Buchanan v. *Litchfield*, 102 U. S. 278, 289-292.

IV.

But if some other standard of authority be not designated by the Act, then the **person or persons** whose duty it may be to execute and deliver or ultimately to **deliver** the bonds will be **conclusively presumed** to be the tribunal designated by law to "ascertain and determine" whether the conditions have been performed which justify the issuance of the bonds as negotiable securities.

Oregon v. *Jennings*, 119 U. S. 74, 92.
Coloma v. *Eaves*, 92 U. S. 484, 487-489.
Lewis v. *Commissioners*, 105 U. S. 739, 749.
Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 298, 299.
Andes v. *Ely*, 158 U. S. 312, 324.

V.

On behalf of *bona fide* purchasers for value a **decision** by such statutory tribunal that all conditions precedent have been performed is **conclusive** and estops the obligor from disputing the fact.

See authorities cited under No. IV *supra*. See especially

Coloma v. *Eaves*, 92 U. S. 484, 491.
Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.

VI.

A recital by the statutory tribunal in the bonds, that they are issued **pursuant** to the authorizing statute, is sufficient evidence to a *bona fide* purchaser that such decision has been made and concludes the municipality.

Andes v. *Ely*, 158 U. S. 312, 324.
Knox v. *Aspinwall*, 21 How. 539, 545.
Oregon v. *Jennings*, 119 U. S. 74, 93.
Insurance Co. v. *Bruce*, 105 U. S. 328, 332.
Livingston County v. *Portsmouth Bank*, 128 U. S. 102, 127.
Pana v. *Bowler*, 107 U. S. 529, 539, 540.
See also cases cited under Nos. IV and V *supra*.

The estoppel, however, is created by and de-

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pends upon the **decision** and not upon the **recital**; the recital being only **evidence** of the decision.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Knox v. *Aspinwall*, 21 How. 539, 545.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 490, 491.
Kenicott v. *Supervisors*, 16 Wall. 452, 464.

VII.

If a municipal corporation is authorized to issue **negotiable** bonds, **provided** that certain conditions precedent have been complied with, and if it shall cause to be recited in such bonds or shall otherwise represent that such conditions have been performed, the municipality is afterwards estopped to dispute the fact.

[*See authorities cited under Nos. IV and V supra.*]

On the faith of these rules petitioner made its purchase, and by them it is now proposed to test

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The opinion declares:

1. That the language of the authorizing statute *does not vest in the trustee* (named

therein) the *power or duty to decide* whether or not the conditions precedent have been performed upon which depend his duty to deliver the bonds, as *negotiable* securities, to the railroad company. (Rec. pp. 63, 54.)

2. That if such power may be inferred from the general language of the act, yet the accompanying direction that the trustee is to hold the bonds "*in escrow*" shows that the vesting of such power was not within the legislative intent. (Rec. p. 65.)

3. That if such power or duty was vested in the trustee, yet his decision is *ineffectual* because it is *not recited in* or endorsed upon the bonds themselves. (Rec. p. 60.)

4. That the admitted consent and co-operation of the County in the delivery of the bonds, its acceptance and use of the stocks which was the consideration for the bonds, the payment of interest, and the deliberate lying by until the time for completing the road had expired, do not estop the

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County from now declaring that the conditions precedent to a rightful delivery of the bonds were not performed. (Rec. pp. 67, 68.)

The correctness of these positions will be considered in their order. We maintain:

FIRST POINT.

The trustee was invested by the Act with the power and duty to decide whether the conditions precedent to a rightful delivery of the bonds had been performed, and his decision is conclusive.

Waiving for the present the alleged limiting effect of the word "escrow" we direct attention to the positive language of the statute.

Its first and fourth sections are alone material to this discussion.

The *first section* provides that the county may subscribe stock and "*pay* therefor in *negotiable* bonds."

The *fourth section* provides that the bonds shall be deposited with a trustee "to be held in escrow, and *delivered* to the said Railroad Company *when* it shall become entitled to the same by the construction of its road through such County, etc." It likewise requires that the trustee shall give bond for the "faithful performance of his duty."

This language, if not controlled by the words "in escrow," fulfills every requirement of the

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rule which conclusively presumes that the trustee was vested with power to decide whether the conditions had been performed, upon which would depend his duty to deliver the bonds.

The bonds are to be *negotiable;* the Act provides no other standard of evidence; designates no tribunal, other than the trustee himself, to ascertain and decide whether the conditions have been performed. The question as to the performance of "conditions precedent" depends upon matters *in pais**; the lawful delivery of the bonds must be preceded by an ascertainment and decision that the conditions have been performed; the trustee can not be quiescent or decline to act; his duty to decide and to act is enforced by a bond for its faithful discharge; he has no colleague or adviser, and the decision must be made by him and by him alone.

That decision when made must, in favor of *bona fide* purchasers, be conclusive, for in no other way can the fundamental purpose to make the bonds negotiable be accomplished.

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*See Appendix, page 69.

In rejecting this conclusion the Circuit Court of Appeals rests its opinion upon three grounds, to wit:

a. "If he (the trustee), is empowered to make any determination whatever, the power is only inferentially granted" (Rec. p. 63); but this inference can not be indulged because:

b. The Act makes no provision "requiring an indorsement of such decision on the bonds or the making of some other permanent record that so grave a determination had been made" (Rec. p. 63); and because:

c. The trustee was not the "agent" of the county; consequently it was not "intended that he should conclude the county through any agency for or in relation to it." (Rec. p. 64.)

We submit that at every step the opinion is in conflict with the decisions of this Court.

In respect to an "inferential" grant of power, it need only be observed that in the long line of decisions from *Knox* v. *Aspinwall* to *Andes* v. *Ely*, in no instance (except *Chaffee* v. *Potter*, 142 U. S., 355, 362, and *Lewis* v. *Commissioners*,

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105 U. S. 739, 742), was the official, whose decision was accepted as conclusive, charged in express words with the duty or power of making such decision. That power was invariably "inferred" from the fact that the designated official was charged with the duty of delivering negotiable bonds upon the performance of certain conditions precedent, and that no other provision was made for determining whether and when they had been performed.

The point was expressly raised and decided in *Knox* v. *Aspinwall*, 21 How. 539, 544; *Bissell* v. *Jeffersonville*, 24 How. 287, 298, 299, and *Oregon* v. *Jennings*, 119 U. S. 74, 92.

In *Coloma* v. *Eaves*, 92 U. S. 484, 489, the Court, quoting and approving *Commissioners* v. *Nichols*, 14 Ohio St. 260, say:

> "A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions to complete a certain railroad, and imposing upon them the duty of *delivering* the bonds when such provision had been made, without indicating any person or tribunal to *determine* that fact, *necessarily delegates that power* to the commissioners; and if delivered improvidently the bonds will not be invalidated."

In the case at bar the statute imposed upon the trustee the duty of delivering the bonds *when* the conditions precedent were performed without indicating any person to determine that fact; it follows that the statute "necessarily delegates" the power to decide to the trustee.

In the same case, at page 488, it is said,

> "At some time or other it is to be ascertained whether the directions of the act have been followed. The *duty of ascertaining* was plainly intended to be *vested somewhere*, and *once for all;* and the *only persons* spoken of, who have any duties to perform respecting the election and action consequent upon it, are the town clerk and the supervisor. . . . *It is a fair presumption*, therefore, that the Legislature *intended* that those officers, or one of them at least, should *determine* whether the requirements of the act . . . had been met."

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, Mr. Justice BREWER said:

> "It is urged . . . that the statute does not *in terms* give them authority to determine whether the preliminary conditions have been complied with.
>
> While it is true that the act does not in terms say that these commissioners are to decide that all

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preliminary conditions have been complied with, yet *such express direction and authority is seldom found in acts providing for the issuing of bonds.* IT IS ENOUGH THAT FULL CONTROL IN THE MATTER IS GIVEN TO THE OFFICERS NAMED."

The second objection, that the Act makes no provision that the trustee's decision should be "endorsed" upon the bonds, or otherwise made a matter of record, is equally untenable.

This is a most startling innovation upon the law governing these securities, and of itself justifies this application for a *certiorari.*

So far as we can recall, in only two of the cases (*Lewis* v. *Commissioners*, 105 U. S. 739, 742, and *Chaffee* v. *Potter*, 142 U. S. 355, 364,) decided by this Court was there a requirement in the enabling Act, that the decision touching conditions precedent should in any way be made a part of the bond, or a matter of record. The "recital" of such decision in the bonds has uniformly been a purely voluntary act not required or suggested by the statute.

The third suggestion in the opinion, that because the trustee was not an "agent" of the

county his powers are to be considered less ample than would be similar powers vested in a county officer, is founded in a total misconception of the decisions of this Court.

A review of these will demonstrate that the conclusive force given to decisions by county officials, respecting conditions precedent, is in no sense whatever based upon their relation of agency for the municipality, but rests exclusively upon the fact that the Legislature has created a "tribunal," and vested in it the authority to "decide" a given question.

The power of the tribunal and the force of its decision are alike *derived from the Act*, and not from the consent or direction of the municipality.

In *Bissell* v. *Jeffersonville*, 24 How. 287, 299, the court refers to the "jurisdiction of the subject-matter" as vested by the Act in the Common Council; and in *Coloma* v. *Eaves*, 92 U. S. 484, 489, the town clerk is referred to as the "arbiter."

In none of the cases has the conclusiveness of the decision and recital been based upon any supposed *agency* of the person authorized

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to decide; it has always been because of a power delegated or vested by the Act itself.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.
Northern Bank v. *Porter Township*, 110 U. S. 608, 617.

See quotation from *Coloma* v. *Eaves*, p. 31, *supra*.

But the following cases seem to settle the question beyond controversy:

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, the persons charged with executing and delivering the bonds *were not county officials* at all. They were special "commissioners" appointed by the Circuit Court of the county—exactly as the trustee herein was appointed by the County Court. The point now made was specially urged in that case. It was held: that the power to decide being "inferentially" granted *by the statute*, the county was estopped and that no question of agency was involved.

In *Andes* v. *Ely*, 158 U. S. 312, 324, the persons authorized to issue bonds and "*inferentially*" presumed to have authority to decide

conclusively as to conditions precedent *were not county officials at all.* They were "special commissioners" appointed under authority of the enabling act.

In this respect those cases are exactly analogous to the case at bar.

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SECOND POINT.

The words "in escrow," as used in the Act, do not so limit or control the accompanying language as to show that the legislature designed to withhold from the trustee the power and duty to decide conclusively as to the performance of the conditions precedent to a rightful delivery of the bonds deposited with him.

The Circuit Court of Appeals concedes that the term "in escrow" is one strictly applicable to deeds only, and is not technically applicable to negotiable instruments.*

But the court declares that the direction to hold "in escrow" "implies that the term was used just as it would be if the subject-matter of the deposit was a deed." (Rec. p. 65.)

The court ignores, as entitled to no weight whatever, the facts that the County Court of

* It is Text-book law that where a deposit is made "in escrow" of negotiable paper, the defense of an improper delivery or failure of the contingency, though good against the payee, will not avail against a *bona fide* holder for value. (6 Am. and Eng. Enc. of Law, pp. 867–869, citing *Vallett* v. *Parker*, 6 Wend. 615, *Fearing* v. *Clark*, 16 Gray, 174; *Clarke* v. *Johnson*, 54 Ill. 296.)

It is apparent, therefore, that there is nothing in the mistaken and colloquial use of the phrase "in escrow" to detract from the peculiar position of authority and responsibility conferred upon the trustee—itself a term involving the reposing of confidence.

Mercer County, its sole fiscal agent, and the County Judge consented and urged that the conditions had been performed and that the trustee should deliver the bonds; and that the construction of the road was stopped short of the county line solely by reason of the urgent desire of the County itself. The Court insists that these words "in escrow" peremptorily forbid a consideration of any question save one: Was the condition of the escrow literally performed?

To this view we now direct attention.

Manifestly, as conceded by the Court, we are not bound to construe the word "escrow" according to its strict technical definition at common law. Having been taken by the Legislature out of its legitimate sphere, evidently in a colloquial sense, we must look to the context to ascertain the sense in which it was used; but the context embraces the whole Act and its general purpose. The Act must be read and the term "in escrow" must be read so as if possible to make all parts of the Act consistent.

Giving to the word "escrow" the effect at-

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tributed to it by His Honor, Judge Barr, in the Circuit Court, all parts of the Act are consistent. As construed by the Court of Appeals, **two** of its most important provisions are **nullified.**

I. In the first place, the Act declares as its fundamental purpose that the County is to "pay for" the stock subscribed in "*negotiable*" bonds.

To constitute negotiable bonds there must be a fixed or ascertainable time, before maturity, when they shall so become negotiable. There must likewise be some standard of evidence or some authority to determine the question, so that a proposing purchaser may definitely and authoritatively ascertain whether at that time they have become negotiable. If such provision be not made, or if a contrary provision be made, then the bonds are not negotiable, and the declaration in the authorizing Act that they are negotiable is nugatory and misleading.

The Act under consideration not only declares that the bonds issued under it are to

be negotiable bonds, but manifestly intends them to become so *when used* to "pay for" the subscribed stock. It likewise provides, in a form which, time and again, has been approved as sufficient by this Court, for a definite and authoritative decision of the question whether the conditions precedent to their lawful delivery, as negotiable instruments, have been performed.

But if by reason of the words "in escrow," the trustee is deprived of the power to decide as to the performance of conditions precedent, and if the defense of non-performance remains always open, then clearly the bonds are not, and under the Act *can not, in any way or at any time, become negotiable.*

That single phrase nullifies absolutely and completely the fundamental purpose of the Act to make the bonds negotiable.

II. But the construction placed on the words "in escrow" nullifies another equally important provision of the Act, viz:

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That the trustee "shall, before receiving such bonds, *give bond* with good surety, approved by the County Judge, for the faithful *performance of his duty* in the premises."

The opinion of Judge Barr treats the fourth section of the Act as harmonious throughout, and gives full effect to this important provision. Under the opinion of the Court of Appeals that provision is useless and without meaning.

Let us consider just what this "bond" provides for.

To **hold** the bonds **until** and to **deliver** them **when** the road was completed was the sole duty of the trustee; the bond was for the "faithful performance" of that duty. In its performance and therefore in the bond, the county and the railroad company had an equal interest.

That the County had an important interest to be protected is emphasized by the fact that the trustee is to be named by and his bond is to be approved by the County Judge.

What then was the true nature of the

County's interest? Against what unfaithfulness was it to be protected? If the Act be construed according to its plain natural import and in accordance with the decisions of this Court, its meaning is clear and simple. The trustee was vested with the power to decide whether and when the conditions precedent to the rightful delivery of the bonds were performed, and thereby to put them forth as *negotiable* instruments. In that fact is found a full and sufficient reason for requiring of him a bond for the protection both of the County and of the Railroad Company.

But, under the opinion of the Court of Appeals, the trustee's bond was as to the County a useless and senseless formality. *There is no conceivable state of circumstances under which the County could ever recover one dollar for a breach of the trustee's bond* —unless perhaps for court costs in some litigation. But to hold that the bond refers merely to costs rather than to the substantial duty imposed on the trustee, is simply to disregard the plain import of language.

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A delivery of the bonds *before* completion of the railroad, whether made negligently, by collusion or with a view to embezzlement, would inflict no injury upon the County; because (according to the Circuit Court of Appeals) the bonds being in escrow are void in the hands of even *bona fide* holders. If lost, converted, or embezzled *after* completion of the road the Railroad Company might have a cause of action on the trustee's bond, but *the County would not.* In case of such default the Railroad company could resort for compensation to the trustee alone.

The Circuit Court of Appeals does not point out wherein the County can possibly have an interest in the trustee's bond except in the matter of costs. It, however, concludes a brief reference to it in these words:

> "It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement or any willful refusal to faithfully perform the trust."

Precisely what effect "the negotiable form" of the bonds was supposed to have, in view

of the opinion that the Act *does not* confer negotiability, we are unable to perceive.

Having shown that the bond affords no protection to the County in the matter of "negligence, conversion, or embezzlement," we proceed to show that, on the basis of the Court's opinion, neither the Railroad Company nor the County could have resort to the bond for any other "willful refusal to perform the trust." Outside of "negligence, conversion or embezzlement," occurring *after* completion of the road, *there could be* no willful refusal to perform the trust. If the trustee had no power to decide as to conditions performed there was no duty upon him to decide; if there was no duty to decide there was no duty to make delivery, for delivery could not rightfully be made until that question was decided. To any demand for action by the trustee he could rightfully respond that having no power to decide he was under no obligation to inquire whether the conditions precedent to a rightful delivery had been performed.

Such is the inevitable result from the opinion of the Circuit Court of Appeals. We submit that it nullifies two of the most important provisions of the Act under consideration.

THIRD POINT.

The decision of the trustee, that the conditions precedent had been performed, is not rendered ineffectual because not recited in or endorsed upon the bonds.

We will hereafter insist that, in effect, the decision of the trustee is "recited" in the bonds in controversy; but, for the purpose of testing the accuracy of the opinion under discussion, we shall for the present concede that there is no such recital.

That there may be no misconception as to the exact position of the Circuit Court of Appeals, we quote from the opinion (Rec. p. 60):

> "Where railroad construction bonds have been issued in violation of the law under which authority was granted, THE MUNICIPALITY HAS NEVER BEEN HELD ESTOPPED to defend upon that ground, UNLESS REPRESENTATIONS APPEARED ON THE BONDS THEMSELVES importing full compliance with the conditions imposed by the enabling Act. The estoppel has been a CONSEQUENCE OF RECITALS or indorsements, etc."

In the case of the *Louisville Trust Company* v. *Louisville, New Albany & Chicago Railway*

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Co., very recently decided, the Circuit Court of Appeals refers to its opinion in this cause, and to that alone as authority, and says (TAFT, C. J.):

> "It now appears to be settled that in such cases the City or County can not be estopped to show irregularities in the issuance of the bonds UNLESS THERE ARE EXPRESS RECITALS of full compliance with statutory requirements, signed by an officer who has the implied or express authority by virtue of the statute to pass upon the question of compliance and to speak for the public or *quasi* corporation issuing the same. *County of Mercer* v. *Provident Life & Trust Co.*, 43 U. S. App. 21, 37."

That opinion goes one step further than the opinion in this cause, to wit: In declaring that even an *indorsement of the trustee's decision* would be ineffectual, and that it must appear by way of "express recital" in the bonds themselves.

The importance of this declaration by the Circuit Court of Appeals can not be overestimated. Vast lines of securities regarded today as safe are liable to be avoided by it.

We submit that the opinion is not supported

by any decision of the Supreme Court, and is in conflict with the reasoning and grounds upon which its various decisions rest.

The question, in express terms, has perhaps not been passed on by this Court; but its determination is necessarily involved in numerous decisions made by it.

In all but a few cases before this Court, the bonds in fact recited full compliance with the law. In every such case, where the persons issuing the bonds were authorized to decide as to conditions precedent, the recital was held to be equivalent to a decision and *therefore* conclusive. Where such authority did not exist the recital was held to be valueless. In the few cases of bonds without recitals it has appeared *either* that no decision had been made, *or* that the decision relied on was made by one without authority to decide. Here, for the first time, we encounter the case of one having (or assumed to have) authority to decide, and having actually decided that all conditions precedent were performed, and yet his decision is not recited in or indorsed upon the bonds. But the question is necessarily involved in

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repeated decisions of this Court, and in effect has been definitely settled by it.

A review of the decisions of the Supreme Court will show that the recital, of the performance of conditions precedent, depends for its value exclusively upon the fact that it is the *evidence of* and is *equivalent to* a decision by the proper official; and that such *decision*, if in fact made, is equally conclusive although not incorporated in the bonds.

1. In only one case, so far as we can recall (*Lewis* v. *Commissioners*, 105 U. S. 239), did the enabling Act require or contemplate that the bonds should contain either a recital or an indorsement as to the performance of conditions precedent; in every case the recitals have been purely voluntary.

It can not therefore be said that the Supreme Court has given effect to such recitals because of any supposed statutory force. Recitals have been held conclusive simply because they are the *evidence of a decision*, which decision is required by the statute and is given conclusive force in order to confer upon bonds a *negotiable* character.

2. That it is the *decision* by the proper official and not its *recital* which confers a negotiable character on bonds, issued in fact before the performance of the conditions precedent, may be established by reference to the reasoning of this Court in many cases.

In the leading case of *Knox* v. *Aspinwall*, 21 How. 539, 544, the Court after declaring that the conditions precedent had not been performed, said:

> "This would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to *determine* whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this Board."

Referring to the fact that "the bonds on their face import compliance with the law," the Court said:

> "The purchaser was not bound to look further for *evidence* of a compliance with the conditions to the grant of the power."

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Manifestly in this great case the *decision* of the county officials is that which was held to give negotiability to the bonds; the recital was merely *evidence* of that decision.

In *Bissell* v. *Jeffersonville*, 24 How. 287, although the bonds contained the usual recital, the Supreme Court in its opinion does not in the slightest degree rely upon that fact. The opinion rests exclusively on the fact that the enabling Act committed to the Common Council of Jeffersonville jurisdiction to decide the question as to the performance of conditions precedent, and that in behalf of innocent holders of bonds its decision was conclusive. Dealing with the defense that the decision of the Council was in fact false, the Court said:

> "It only remains to consider the *effect of that determination*. . . . It must have been understood by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means of borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the Act, it contemplated that the bonds should be issued before it was *conclusively determined* that the requisite number of legal voters of the city had

> petitioned the Common Council. . . . Duly certified copies of the record of the proceedings (of the Council) were *exhibited to the plaintiffs at the time they received the bonds*, showing to a demonstration that a further examination of the subject would have been useless."

The judgment of the lower court was reversed, because it had admitted evidence tending to show that the decision of the Council was untrue in fact.

Manifestly the negotiability of the bonds was made to rest not upon the recital in the bonds but on the fact of the decision.

In *Marcy* v. *Oswego*, 92 U. S. 637, 639, Mr. Justice STRONG said:

> "Where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their *decision* is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive."

In *Coloma* v. *Eaves*, 92 U. S. 484, 490, the Court said:

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> "The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. . . . Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for *evidence* of the existence of things *in pais*."

In the same opinion the Court has drawn the very distinction for which we contend. Quoting from Dillon on Municipal Corporations, to the effect that the "determination of a matter *in pais*" by the tribunal "invested with power to decide whether the condition precedent has been complied with" is conclusive, the Court say, that "this is a very cautious statement of the doctrine. It may be restated in a slightly different form," and continue (p. 491):

> "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, *for the recital is itself a decision* of the fact by the appointed tribunal."

The necessary inference from this language is, that the Court approves the "cautious state-

ment" of Judge Dillon that the *decision* is conclusive, and then goes a step further and holds, to wit, that even though there has been no express determination, yet a recital estops the county because, in favor of a *bona fide* holder, *it is a decision.*

In *Kenicott* v. *Supervisors*, 16 Wall. 452, 464, the Court said it was settled that,

> "A recital that the election has been held, or that the fact exists, or has taken place, will be sufficient *evidence* of the fact to all *bona fide* holders of the bonds."

In each of these cases *the fact of the decision* is declared to be the controlling fact; the recital is merely referred to as the *evidence* or certificate of the decision; in neither of them is there a suggestion that the decision depends for its conclusive force upon its recital in the bonds. The entire ignoring of the fact of recital in *Bissell* v. *Jeffersonville*, coupled with the declaration that proceedings of the Council "were exhibited to the plaintiffs at the time they received the bonds," conclusively establish that the mere recital was deemed unimportant.

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The authorities referred to by the Circuit Court of Appeals in support of its proposition are,

Coloma v. *Eaves*, 92 U. S. 484.
Dixon v. *Field*, 111 U. S. 82, 93.
German Bank v. *Franklin County*, 128 U. S. 526.
Citizen's Association v. *Perry*, 156 U. S. 692, 701.

Neither of the cases sustains the opinion of the Court.

Coloma v. *Eaves*, as reviewed above, contradicts rather than supports its opinion.

In *Dixon* v. *Field* the bonds were held void, although there was a *full recital*, because the statute fixed an "express and definite record of a public character," and therefore the County officials had no power to make any decisions respecting the performance of the conditions precedent. (See No. III, p. 22, *supra.*)

In *German Bank* v. *Franklin County*, *the bonds contained no recitals*, and the certificate of the auditor attached to the bonds, as stated by this court, neither "covers or certifies any fact as to compliance with the conditions prescribed;" and furthermore, the audi-

tor had no power to decide any thing relative to the bonds.

In *Citizens' Association* v. *Perry*, there was neither a recital in the bonds of compliance with the Constitution of 1870, nor was there any decision by an authorized officer that the conditions precedent had been performed.

The cases are inapplicable to support the opinion of the Circuit Court of Appeals. In no case has it been held or intimated that a recital on the face of bonds is essential to give validity to the decision of an authorized officer in respect to the performance of conditions precedent.

If the petitioner on purchasing the $100,000 of bonds inquired and found that the trustee had decided that the conditions precedent had been performed, that the County Court expressly concurred in that decision as correct in fact, and that under such circumstances the bonds were then issued with a recital of compliance, was it not entitled to to rely upon such information quite as securely as upon an indorsement on the bonds? The indorsement is only evidence of the decision;

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and evidence of the decision would seem to be sufficient whether by way of indorsement or otherwise.

In conclusion of this point, we insist that the recital, on the face of the bonds in controversy, that they are issued "pursuant" to the enabling statute is equivalent to *a representation both by the county and the trustee* that all conditions precedent had been performed.

We concede that the purchaser of these bonds is charged with notice of the enabling statute and that it requires the bonds to be placed in the hands of a trustee before performance of the conditions precedent. But the statute does not provide nor contemplate that they shall contain a recital of conditions performed. The insertion of this recital was purely voluntary. The delivery of the bonds by the trustee, with that recital, *was an adoption of it by him*, and is the full equivalent of a recital by the trustee on the face of the bonds, or of a separate indorsement by him on the bonds. It is exactly as if, after the conditions were fully performed, the county had caused the bonds to be re-engraved,

embodying this recital for the purpose of declaring that the conditions were performed and the trustees had put them forth in that form and for that purpose. The recital being purely voluntary it could have no other purpose than to declare to purchasers that, as decided by the trustee, the conditions precedent had been in fact fully performed.

If this be not so, and if it be true that a "recital" is essential to give validity to the trustee's decision, it follows that, as the Act makes no provision for a signing of the bonds by the trustee, it was impossible that, in any way, the bonds could ever be made "negotiable" and the expressed purpose of the Act, that they should be negotiable, is absolutely nugatory and misleading. Such a view is in conflict with the settled rulings of this court.

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FOURTH POINT.

The co-operation of the County in the delivery of the bonds, its acceptance and use of the certificates of stock which were the considera- for the bonds, the payment of interest and the deliberate lying by until the time had expired for completing the two unfinished miles of road, estopped the County from setting up the defense that the conditions precedent had not been performed.

Preliminary to a discussion of the opinion of the Circuit Court of Appeals on this point it seems proper to bring briefly into view the facts on which our contention depends. When the railroad was completed through Harrodsburg to Burgin, approaching within two miles of the southern line of Mercer County, the Railroad Company conceived itself to be entitled to the bonds. The trustee was in doubt whether the conditions precedent were fully performed. The Railroad Company at once prepared to extend the road across the County line to Danville. Thereupon, in order to prevent its extension, the County Court, composed of the Magistrates and County Judge, was convened

to consider the question. By a resolution entered of record, the members of the court, while disclaiming the right to instruct the trustee, expressed the opinion that the conditions had been performed, and advised that delivery should be made and the construction of the railroad not forced to the Boyle County line. This fact and the fact that the trustee had decided that the conditions had been complied with was made known throughout the County generally. The trustee waited nearly one month before making a delivery. No steps were taken towards injunction nor any objection made to the trustee's action. Finally in the presence of the County Judge and with his consent the bonds were delivered. The stock subscribed for was delivered to and received by the County Judge, and the county holds it to this day, having voted it upon many important occasions. For two years and a half the county paid the interest regularly, and only after the lapse of five years from the date of subscription, when, under the contract, the railroad could no longer perform, the county repudiated the obligation of the bonds.

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Estoppel arises not alone because of a power in county officials to *decide* as to the performance of conditions precedent; but because of representations or other conduct by the county officials to mislead *bona fide* purchasers of its bonds.

If it be within the power of the County to create an estoppel it has certainly done so. We submit that it is estopped by its own conduct.

The Circuit Court of Appeals rejected this contention upon the authority of cases which very properly hold that where a municipality had originally no power to contract there could be no estoppel by ratification or otherwise. But here the County was authorized to execute the bonds. A clear power to contract was conferred, and though the right to exercise it depended upon the happening of a certain fact, yet it was actually exercised under circumstances which justified the purchaser of the bonds in believing that the fact had happened. The County should therefore be estopped from denying that it had acted unlawfully. *With full knowledge of the facts the County deliberately consented to the delivery by the trustee of its*

bonds bearing on their face a recital that all the conditions precedent had been performed.

The fact that the conclusive decision of that question was vested in the trustee, did not relieve the County from its duty to forbid and prevent delivery of the bonds before performance of the conditions. The putting forth of the bonds under the circumstances was a distinct *representation by the County as well as the trustee* that the conditions had been fully performed.

Would not a purchaser having knowledge of these facts be entitled to rely upon the action of the County in connection with the recital in the bonds as a representation of the performance of all conditions precedent? The action of the County, consenting that the bonds should go forth with such a recital upon their face and the acceptance by it of the subscribed stock amounted to a deliberate fraud perpetrated upon the petitioner, if indeed the County is now permitted to defend upon grounds which are contrary to its representation.

The following quotations from the opinions

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of this court are, we submit, conclusive of the question.

It is impossibe to find language more explicit and emphatic than in the opinion of this Court in *Pendleton County* v. *Amy*, 13 Wall. 297–304, where it is said:

> "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done or have insufficiently done the things which the legislature required to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds

in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest and the bonds."

The language of the opinion in *County of Ray* v. *Vansycle*, 96 U. S. 675, 687–8, is equally pertinent:

"There is nothing in the record upon which to base any imputation of collusion or bad faith. The action was taken under such circumstances of publicity as to notify the taxpayers generally of all that was doing; and we are not prepared to say that the court had not the power to transfer the subscription from the North Missouri Railroad Company to the St. Louis and St. Joseph Railroad Company, and deliver the county bonds to the latter upon its agreement to build substantially the same road for the construction of which the original subscription had been made.

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"But whatever doubt exists upon this point should be resolved in favor of the *bona fide* holders of the bonds. The taxpayers of the county should not, under the peculiar circumstances of this case, be now heard to allege that their agents, invested by statute with the authority and charged with the duty of protecting their interests, had exceeded their powers. . . .

"Upon the clearest principles of justice the taxpayers of Ray County are concluded by the acts of their official agents, and by their own failure, either intentionally or from neglect, to assert by appropriate proceedings, their legal right (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company."

So in *County of Clay*, v. *Society for Savings*, 104 U. S. 579, 590, the payment of interest for nine years and eleven years was held sufficient to cure irregularities in issuing the bonds.

In *Anderson County* v. *Beal*, 113 U. S. 227–240, the want of proper notice of an election was held only an irregularity, and the failure of the municipality or the taxpayers to enjoin the issue or use of the bonds was regarded as sufficient ground for holding the municipality estopped.

In *Mercer County* v. *Hacket*, 1 Wall. 83, and *Ward* v. *Lawrence County*, 1 Black, 386, both approved in *Grand Chute* v. *Winegar*, 15 Wall. 355, the bonds were sold at less than par, in violation of the Act, which prohibited such sale. The same ruling was made in *Bissell* v. *Jeffersonville*, 24 How. 287; *Meyer* v. *Muscatine*, 1 Wall. 384; *Rogers* v. *Burlington*, 3 Wall. 654; *County of Chambers* v. *Clews*, 11 Wall 317, 321.

A very recent statement of the position of this court is to be found in the opinion of Mr. Justice Brewer, in *Andes* v. *Ely*, 158 U. S. 312, 321, in which he says:

> "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to the case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the

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county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity. We think there is eminent wisdom and justice in the observations of the Court of Appeals in the case of *Calhoun v. Millard, supra* (121 N. Y. 69):

"'The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition encouraged investments therein as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid. The legislature has still the power to ratify them and make them valid obligations of the town. *Williams v. Town of Duanesburgh*, 66 N. Y. 129; *Horton v. Town of Thompson*, 71 N. Y., 513; *Rogers v. Stephens*, 86 N. Y. 623. They are now in the hands of *bona fide* holders, that is, of persons who have paid value for them without notice. . . . The denial of relief in this case may result practically in enforcements of the bonds in question, and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and taxpayers on the one side, and the purchasers of bonds on the other, we can not say that such a result will be repugnant to any principle of justice or equity.'"

Conclusion.

The petitioner therefore submits that the writ of *certiorari* should be granted, because the opinion of the Circuit Court of Appeals is clearly opposed to and disregards the settled doctrine of this Court with regard to the issuance of negotiable bonds.

SAMUEL DICKSON,
THOMAS W. BULLITT,

Counsel for the Provident Life & Trust Co. of Philadelphia, Petitioner.

OCTOBER 12, 1896.

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APPENDIX.

NATURE OF THE CONDITIONS PRECEDENT.

(Referred to in foot note on page 29, *supra*.)

It may be easily seen that the "conditions precedent" to a lawful delivery of the bonds are matters purely *in pais*.

The conditions precedent required by the Act, and the contract of subscription expressly authorized by it, were that the railroad "shall have been so completed through such county that a train of cars shall have passed over the same" *prior* to January 10, 1892.

Obviously two things were necessary; *first*, that the road should be completed *through* the county, and *second*, that a train of cars should pass over it *before* January 10, 1892.

We shall consider these requirements in reverse order.

I. The question whether or not a "train of cars had passed over" the road prior to a certain day, or at all, is clearly matter *in pais*. There was no effective way of making it a matter of record, and the Act does not so attempt.

The failure to send a train of cars over the line prior to January 10, 1892, would have been as fatal to the right of the railroad to demand the bonds as a failure to construct the road "through" the county. Evidently, if the bonds were to be "negotiable," some tribunal must have been established to ascertain and determine that question.

If the trustee was to ascertain and determine that fact, there is certainly nothing in the Act to justify the inference that he was not to decide as to the other fact. Was it designed that one part of the same condition, expressed in the same sentence, and inseparably connected by the very language of its creation, should be determined by the trustee, and the other part by "inspection" on the part of every purchaser of the bonds? The very suggestion seems absurd.

II. The question whether the road was completed to a given line of Mercer County is equally and clearly matter *in pais*.

It is indeed urged that the statutes fixing the boundaries of Mercer County are presumptively known to all persons.

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If that be conceded, it does not follow that the statutes, even if accurately defining the boundaries, would convey knowledge of the topography of the country; nor that the Legislative Act authorizing the issue of Mercer County bonds intended that every purchaser of those "negotiable" securities should visit Kentucky to see whether the railroad actually crossed two opposite lines of the county.

But the fact is that the statute defining the present south boundary of Mercer County, gives absolutely no certain indication of its location or direction. It was fixed by "An Act to establish the County of Boyle, and for other purposes," approved February 15, 1842.

The material sections are as follows:

"SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That from and after the first day of March next all those parts of Mercer and Lincoln counties within the following boundaries to wit: beginning at the point where the Casey, Mercer, and Lincoln lines meet; thence running a direct line to *Shelby's meeting house*, in Lincoln County; thence in a direct line to the *five-mile tree* on the main road leading from Danville to Stanford; thence a direct line to the mouth of Street's branch in the Hanging Fork; thence with the mean-

ders of and down said fork to its mouth in Dick's River; thence down and with said river to a point thereon from which a due east and west line therefrom will include the *house, yard, and garden of the late Judge Boyle*, now owned and occupied by Robert Tilford, in Mercer County; thence from said point said due east and west line so as to include said house, yard, and garden; thence in a direct line to the *bridge across Harrod's Run*, on the turnpike road from Danville to Harrodsburg; thence to the *bridge across the Dry Fork* of Chaplin on the turnpike road from Perryville to Harrodsburg, and continuing the same course to the Washington County line; thence with the Washington and Marion east county lines to the north Casey line; thence with the Casey County line to the beginning, shall be, and the same is hereby, stricken from Mercer and Lincoln counties and erected into one distinct and separate county, to be called Boyle, in honor of Kentucky's distinguished jurist, John Boyle."

"SEC. 7. That the surveyor of Garrard County shall be, and he is hereby, appointed commissioner, with such assistants as he may deem necessary to employ, to run and mark the boundary lines of said county of Boyle, who shall be allowed three dollars per day for his services whilst engaged, and two dollars per day shall be allowed to each of the persons he may engage to assist him, payable out of the county levy of said county of Boyle."

It is to be observed:

First. That the Act recognizes that an actual *survey* is essential to fix the line, and that the

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surveyor of *Garrard* County is directed to make the survey.

Second. That the act points out no officer to whom the survey shall be returned; makes no provision for its record, nor gives any direction as to how the line shall be marked so that a person could find it.

Third. A person, by following the Act, could not now make a new survey for himself and thus determine the county line; the Act gives no calls or distances, and now, after fifty-five years, it can not be judicially presumed, that the "five mile tree," "Shelby's meeting house," "house, etc., of the late Judge Boyle," and the various "bridges" are still standing so that a person could locate the line required by the Act.

It must be presumed that in authorizing Mercer County to issue the bonds sued on herein, the Legislature had in mind the impossibility that any stranger, could locate the county line between Mercer and Boyle counties, and if it was the intention to require the Louisville Southern Railroad to be built to the county line, that difficulty afforded the most

conclusive reason for designating a specific tribunal authoritatively to determine the question.

A more fitting selection could not be made than an intelligent citizen of that county placed under bond "for a faithful discharge of his duty."

No. 622, 243.

Brf. of Humphrey & Davie for P. Co.

Filed Oct. 10, 1896.

MERCER COUNTY BOND CASE,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

622.

EX-PARTE

The Provident Life and Trust Company, of Philadelphia,
Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN OPPOSITION TO PETITION.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
Counsel for Mercer County, Respondent.

JOHN B. THOMPSON,
JOHN W. HUGHES,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

EX-PARTE

The Provident Life and Trust Company, of Philadelphia,

Petitioner.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE WRIT OF CERTIORARI.

The petition for writ of certiorari in this case and the accompanying brief make up a volume of seventy-four pages. The very length of the brief demonstrates that there is in this case no sharply defined point upon which the petitioner is able to rest its case.

Indeed, from pages 19 and 20 one might justly infer that Congress had made a mistake in not requiring this court to review all opinions involving the validity of municipal bonds. We do not think it necessary to cite from the several cases in this court the principles controlling the granting of a certiorari. It is enough to say that they fully recognize that the Circuit Courts of Appeal were established with the knowledge that their jurisdiction would be large, varied, and

important; that they would be called upon to decide cases of great magnitude and involving new principles as well as the application of old ones. Congress might well have thought, and no doubt did think, that there were certain subjects at least upon which this court had so fully spoken that the new courts would have no great difficulty in following and applying the precedents which had been set for them.

There is no subject to which this court has given more time, thought, and labor than that of municipal bonds. We have had some curiosity to count the citations in the Lawyers' Co-operative Digest of the Reports of this Court on the subject of municipal bonds. These citations, including one hundred and fifty-four United States, are no less than five hundred and eight. We of course do not mean that these are five hundred and eight different cases, because, as most, perhaps all of them involve more than one point, the title will occur more than once in the Digest. At any rate the fact is that upon no subject are the Circuit Courts of Appeal so well instructed by the decisions of this court as upon that of municipal bonds. If they can not be trusted to apply these principles thus illustrated to them, and if this court is to find it necessary to grant the writ of certiorari in cases of this kind, then we can not imagine any class of cases in which the Circuit Court of Appeals should be left the power, duty, and responsibility of final adjudication.

The fact that this court is determined to carry out the view held by the lawmakers in establishing the Circuit Courts of Appeal is strongly evidenced by the overruling at the last term of this court of no less than forty-eight applications for writs of certiorari. How many were granted we do not know. This court refused in at least two instances to review cases of this character, in one of which the Circuit Court of Appeals had held for the bondholder and in the

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other for the county—Quaker City Bank v. Nolan Company, 66 F. R. 883; Mayor of Columbus v. Dennison, 69 F. R. 58.

Coming to the case at bar we do not believe that we are called upon to argue the question as to whether it was rightly or wrongly decided by the learned Circuit Court of Appeals. The decision is reported under the style of Mercer County v. Provident Life and Trust Company of Philadelphia, 72 F. R. 623. The opinion of the learned appellate court was unanimous, and thoroughly reviews the law and the facts. So far as we can recall there is no point made in the petition for a certiorari or the brief accompanying it that was not made before the Circuit Court of Appeals, and considered and passed upon in the opinion of that tribunal. A petition for rehearing was presented and denied. There can be no doubt that this case has been thoroughly tried and patiently and intelligently considered.

The case, briefly stated, is about as follows:

The legislature of Kentucky authorized Mercer County to subscribe to the Louisville Southern Road. The act provided for the taking of a vote upon the question, and the ascertainment of the result of that vote by the county authorities. The act then provided that in the event of success upon the part of those favoring the subscription, the county court should immediately execute bonds and deposit them in the hands of some trustee or trust company, to be held in escrow and not to be delivered until the railroad should have performed a certain precedent condition, which was set forth in the act. The act expressly provided that the bonds should not be valid or binding until the railway should have been completed through the county. It can not be disputed that the condition which the legislature made as precedent to the validity of the bonds has never been fulfilled. The railway was never completed through the county. It can not be dis-

puted that the officers of the law obeyed the terms of the statute by executing the bonds and depositing them with the trustee prior to the time when the precedent condition could have been performed. The bonds recite that they were issued in pursuance of this act. Any one reading the bonds and reading the act would know for a certainty that at the time the bonds were signed with this recital in them the conditions precedent to their validity had not been performed. The county authorities in signing these bonds could not therefore have possibly been construed as stating that such condition precedent had been performed.

The legislature, in authorizing the bonds to be issued, declared in so many words that they should not be valid and binding obligations upon the county until and unless this condition precedent was performed, and further provided that the depositary should not deliver the bonds until the condition precedent had been performed. There is absolutely no recital either in the face of the bonds or upon the back of the bonds that can be tortured into a statement that this condition precedent has ever been performed. The only ground of estoppel, therefore, against the county arises from the fact that the trustee did deliver the bonds. In saying this we do not omit to notice the fact that other grounds of estoppel are alleged; such as paying interest on the bonds for a short while; voting the stock of the railroad company, and the failure upon the part of the citizens of the county to file a bill to enjoin the trustee from delivering the bonds. These, we submit, have been passed upon adversely by this court so often that no citation of authority is necessary, and the matter is fully dealt with in the opinion of the Circuit Court of Appeals.

We have, therefore, the case of an alleged estoppel against the county entirely unaccompanied by any recital, by any

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declaration either in the face of the bonds or upon their back that what was made by the legislature a prerequisite to their validity had ever been performed. The fact that the bonds were delivered by the trustee and are in the open market is no estoppel. Mere delivery is not equivalent to a recital. This also has been so often held by this court that we need cite no authority.

The question, therefore, is bound to present itself as it would if the railroad company were suing on the bonds. In other words, there is no case in this court which has ever held that in the absence of a recital a *bona fide* holder is under less obligation to establish the validity of the bonds than is imposed upon one who had knowledge of the facts. This court has consistently held that as long as there is no declaration upon the bonds in regard to the existence of the requisities to make them valid, the existence of these requisites can be challenged whether the bond is sued upon by the original taker or any transferee from him. In other words, the question of *bona fide* holder has no place in such a discussion.

The fact that it is difficult to ascertain whether or not a condition precedent has been performed is quite beside the question. It is to be expected that as time goes on legislatures will be more and more chary in allowing a mere majority of a community to impose the obligation of municipal indebtedness upon the minority for the benefit of a private corporation. The legislature has the power to give or to withhold its sanction from municipal subscription. It may impose any conditions upon the sanction that seem to it proper. Neither the railroad company nor any purchaser of the bonds has any right to complain that the authority is too narrow or too limited in its scope, or that the facts going to show that the bonds are valid and binding obligations are

difficult to ascertainment or proof. All this is a matter of legislative discretion, and neither the railroad company, the original beneficiary of the sanction of the municipal indebtedness, nor one who chooses, without inquiry, to buy these obligations, has any right to complain. It remains in this case, as is so well set out in the opinion of the Circuit Court of Appeals, that the legislature of Kentucky informed every purchaser of these bonds that the fact that they were signed as complete instruments by the county authorities did not make them the valid obligation of the county, but that notwithstanding such full and complete signature and execution they were not to be the valid or binding obligations of the county until and unless something should occur after such signature and execution, viz., the performance by the railroad company of its part of the contract.

When the legislature directed that the bonds should be deposited with some trustee or trust company it declared that this deposit should be in escrow. Here again we are met with the argument by the petitioner that the legislature did not know what the word escrow meant; that this word is one properly applicable to deeds and not to instruments of this character, and, it is argued, in effect, that as the legislature did not know what the word meant, the courts should properly declare that it did not mean any thing at all. It is not suggested, however, what other word the legislature could have used to make the meaning clearer, nor to express the thought that was evidently in the legislative mind to the effect that delivery being essential to the validity of any instrument, whether of grant or executory contract, there should be no delivery of these bonds unless and until a condition precedent named in the act had first been performed.

It can not be denied, that it is the performance of the condition precedent and not the delivery that gives effect to a deed

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delivered in escrow; that a delivery without the performance of the condition precedent is no delivery at all. We see no reason why exactly the same principles should not be applied to negotiable instruments, provided the public are by something written in or on the negotiable instruments notified that they have been put in escrow. The bonds in the case at bar could not have more plainly indicated this if there had been written across their face a statement to the effect that "this bond, after having been signed by the county authorities, was placed in escrow with a depositary appointed in accordance with law, and the said depositary has neither power nor authority to deliver this bond until and unless the conditions precedent set forth in the act authorizing this bond have been performed." We say that this was written in the face of this bond because the bond declares upon its face that it is issued in pursuance of the act that requires these very things to be done.

We submit that there is no distinction between the character of instruments put in escrow, where the instruments show in their face that they have been put in escrow.

In the face then of the fact that this condition precedent has never been performed; that the petitioner had knowledge of the fact that the bonds were invalid unless it had been performed; that the petitioner might easily have ascertained that it had not been performed; that the petitioner knew from reading the act that if the county authorities followed the law the recital in the bonds, so far from being to the effect that the condition precedent had been performed, was to the effect that it had not, at the date of the signing of the bonds, been performed; that the petitioner knew that the bonds had been put in escrow; that while in escrow they were absolutely invalid because they had never been delivered; that the depositary in escrow had no authority to deliver except on

the performance of the condition, and that there is absolutely no recital any where of the performance of the condition to be found on the bond; it seems to us that the principles laid down by this Court have been strictly followed and applied by the learned Circuit Court of Appeals in the case at bar.

We respectfully ask that the petition be denied.

ALEXANDER POPE HUMPHREY,
GEORGE M. DAVIE,
For Respondent.

JOHN B. THOMPSON,
JOHN W. HUGHES,
Of Counsel.

No. 243.

No. 243.

FILED.
MAR 14 1898
JAMES H. McKENNEY,
CLE

Brief of Humphrey and Davis for P. E.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Mar. 14, 1898.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
Plaintiff in Error,

VERSUS

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA,
Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN B. THOMPSON,
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JOHN P. HUGHES & CO., PRINTERS, LOUISVILLE.

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IN THE

Supreme Court of the United States.

COUNTY OF MERCER, STATE OF KENTUCKY, - *Plaintiff in Error,*

VERSUS

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA,
Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

This is an action at law brought by the Provident Life & Trust Company against the County of Mercer in the United States Circuit Court for the District of Kentucky. The Trust Company sought to recover several installments of coupons taken from $100,000 in par value of the bonds of that county. In the court of first instance a jury was waived, under the statute, and the facts found by the Honorable John W. Barr, sitting as Circuit Judge. Judgment was rendered in favor of the Trust Company for the amount claimed.

From this judgment a writ of error was taken by the County to the United States Circuit Court of Appeals for the Sixth Circuit. The judgment was there reversed and the case remanded, with directions to enter a judgment in favor of the county. The opinion of the trial judge is given at page 34 of the record. The opinion of the Circuit Court of Appeals is reported 72 F. R. 144, 19 C. C. A. 414, and is also contained in the record at page 43.

The case turns upon the construction and effect to be given to the act of the Kentucky Legislature authorizing the county to subscribe for stock in the Louisville Southern Railroad Company, and issue bonds in payment therefor. This is printed in full in the appendix to this argument.

The county-seat of Mercer County is Harrodsburg. The Louisville Southern was a railroad projected to start from Louisville and run southeastwardly, through the counties of Jefferson, Shelby, Anderson, and Mercer, and beyond that to the Tennessee line.

At the time of the passage of the act allowing Mercer County to subscribe stock to this railroad, a company, called the Southwestern Railroad Company, had a line of railroad from Harrodsburg, running southeast about four miles to a junction with the Cincinnati Southern Railroad, the junction point being in Mercer County, about three fourths of a mile south of a station called Burgin. Through this railroad the people of Mercer County, contiguous to Harrodsburg, had railroad facilities south to Chattanooga and north to Cincinnati.

The act authorizing the subscription to stock gave the county the right to issue negotiable bonds in payment of such subscription. It provided for a vote of the people upon the question of subscription, directed the county judge to ascertain whether a majority of the legal votes cast at the election were in favor of the subscription, and if they were, further directed him to enter an order subscribing in behalf of such county to the capital stock of such railroad company, in accordance with the terms of the proposition voted on; and further provided that he should "thereupon cause to be prepared and executed the negotiable bonds of such county as before mentioned; which should be signed by him as county judge and attested by the county clerk with his official seal affixed thereto; and the coupons should be signed by said clerk."

The act further provided as follows:

"The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same; at which time they shall be delivered to the said railroad company in payment of the subscription of such county; and the county shall thereupon be entitled to receive certificates for the stock subscribed; and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county; provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises; and provided, further, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The county voted, under certain terms and conditions to be hereafter mentioned, to subscribe $125,000 to the stock of the railroad.

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The county judge at once executed these bonds and delivered them to a trustee appointed by the county court.

The railroad company built its line from Louisville through the counties above named, entering Mercer County on its northern line and going thence to Harrodsburg. It there connected its line with the line of the Southwestern Railroad, and acquired the capital stock of that company. It then extended that road north from its junction point with the Cincinnati Southern, about three quarters of a mile, to the town of Burgin, but did not build it to the county line.

The first trustee appointed by the county court resigned. Thereupon another trustee was appointed, and he, in August, 1888, delivered to the railroad company 105 of these bonds—of which 100 are represented in the suit now before the court.

It can not be claimed that the railroad was ever built through the county. It is our contention that the acquisition of the Southwestern Railroad did not come within the terms of the act; but even if it did, still the condition upon which the bonds were to be the valid obligations of the county has not been fulfilled because the railroad stopped two miles short of the county line. (R. 27.) The controversy at last turns upon whether a purchaser of the bonds must take notice of the facts, and as to whether the condition not having been complied with, the bonds are, as the act declares them to be, "not the valid or binding obligations of Mercer County."

Facts.

The trial court found the facts of the case to be substantially as follows: (R. 16.)

That the County Court of Mercer County was petitioned on the 18th of November, 1886, by more than twenty-five resident taxpayers of the county, to submit to the vote of the legal voters of the county the question of whether or not the county should subscribe $125,000 in the capital stock of the Louisville Southern Railroad Company upon certain terms and conditions stated in the petition. These terms and conditions were as follows:

"Such bonds shall not be binding or valid obligations until the railroad of the said company shall have been so completed through such county that a train of cars shall have passed over the same; nor shall such subscription be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg or a connection with the Southwestern Railway at its present depot in Harrodsburg; nor shall said bonds be delivered until the said railroad

company shall have constructed in Harrodsburg, or within one half mile thereof, a round house with not less than ten stalls, and shall have entered into an agreement in writing with the county judge of such county, for the benefit of such county, to erect in Harrodsburg, or within one quarter of a mile thereof, and within one year thereafter, to construct and operate permanently there its terminal or divisional machine and repair shops, and such other shops or structures as may be necessary or convenient to the operation thereof; such agreement to be executed by the proper officers of said railroad company, accompanied by a certified copy of the resolution or proceedings of the stockholders of said company authorizing such agreement; and $20,000 of such county bonds shall be retained in the hands of the trustee or trust company hereinafter named as additional security for the performance of said agreement by said railroad company, and shall not be delivered to it until it shall have constructed the machine and repair shops and other structures mentioned in and contemplated by the aforesaid agreement."

The railroad was to comply with the conditions of the subscription within five years from the time it was made, else it was to be void and the bonds canceled. If the majority of the legal votes cast at the election should be in favor of the subscription, the bonds were to be executed and deposited with the trustee or trust company designated by the county judge, to be held as set forth in the act; but before delivery all past due coupons attached to the bonds were to be clipped therefrom and destroyed by the trustee or trust company in the presence of the judge. The trust company or trustee designated as a depositary, before receiving the bonds, was to execute an obligation, with good surety approved by the county judge, for the faithful performance of his duties in the premises. As bonds were delivered to the railroad company certificates for stock in that company were to be delivered to the county judge for the use and benefit of Mercer County.

In pursuance of this petition and in pursuance of the notice required under the act an election was held, the result of which was determined by the county judge of Mercer County to be that for the the railroad subscription there were 1,683 votes, and against it, 1,250 votes. It being thus determined that a majority of the legal votes cast at the election were in favor of the subscription, the county court ordered that the county should subscribe to the capital stock of the railroad $125,000, the subscription being made subject to and in accordance with the terms and conditions of the proposition as set forth above. The subscription was accordingly made upon the order book of the court.

Thereupon at once the county judge prepared and executed the $125,000 of bonds and delivered the same to D. L. Moore, who was

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appointed, after motion by the railroad company, the trustee to hold the bonds in escrow. Mr. Moore gave bond to insure his faithful custody and delivery of these obligations, but subsequently, on the 3d of July, 1888, resigned. Thereupon one Isaac Pearson was appointed trustee, and gave bond, Mr. Moore delivering to him the $125,000 of bonds. The railroad company, with sureties, executed to Mr. Pearson a bond indemnifying him against any loss if he would deliver 105 of the bonds; which he accordingly did.

The court found that prior to June 1, 1888, the railroad had been completed from the city of Louisville to Harrodsburg, and that the railroad company then owned all the capital stock of the Southwestern Railroad; had taken possession of its line and extended the track to Burgin; and that on that day, viz., June 1, 1888, a train of cars, moved by an engine, passed over the railroad from Louisville through Harrodsburg to Burgin, and returned over said track to Louisville; and that since said time the railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern Railroad.

The court further found that June 27, 1889, the Southwestern Railroad was consolidated with the Louisville Southern, but that this Southwestern Railroad had been constructed and operated prior to November, 1886, and ran from its depot in Harrodsburg to a junction with the Cincinnati Southern Railroad, about three quarters of a mile south of Burgin, and that after this railroad came into possession of the Louisville Southern it was extended to Burgin, and the junction made with the Cincinnati Southern at that point, and that this was done prior to June 1, 1888.

The court further found that from Harrodsburg to the point where the Louisville Southern crosses the line between Anderson and Mercer counties is fifteen miles; the distance from Harrodsburg over the Southwestern Railroad as extended was 4.72 miles; that Burgin was three miles from the south line of Mercer County, and from the extreme east line of Mercer County, 4.74 miles, and that following the line of the Cincinnati Southern to the south line of Mercer County, which is the dividing line between that county and Boyle, Burgin is distant three miles, and from Danville, seven miles.

The court further found expressly that the Louisville Southern Railroad did not run from one line of the county of Mercer through to the opposite or another line of the county.

The court further found that about the time of the passage of a train of cars from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the

delivery of 105 of the bonds of the county had been complied with by the Louisville Southern Railroad Company; that there was some difference of opinion among the taxpayers of said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds; but there was no formal demand made upon nor refused by him before his resignation as trustee; that this question of whether the railroad must be built from one line of the county to another was publicly and generally discussed; that while this discussion was going on and before Pearson had determined that the condition precedent had been fulfilled and that he would deliver the $105,000 of the bonds, the Louisville Southern Railroad prepared to extend its railroad toward and to the town of Danville, Boyle County, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way, with one exception, to the Mercer County line; that there was a movement made to have the court of claims of the county instruct the trustee as to his duty in the premises; that that court, consisting of the county judge and the justices of the peace of the county, met on the 26th of June, 1888, and after a full discussion was had, the court declined, as a court, to instruct the trustee as to his action; but upon motion of one of the justices, they passed and had spread upon the records the following resolution:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of opinion that such delivery should be made, and the construction of the railroad not forced to the Boyle County line."

The court further found that Pearson, Trustee, after his acceptance of his trusteeship, decided that the conditions precedent had been complied with by the Louisville Southern, and it was entitled to the delivery of the 105 bonds of Mercer County; and that in August, 1888, he did deliver the bonds in the presence of the county judge, the past due coupons being then cut off, and there being then delivered to the county judge the certificate for $105,000 of the capital stock of the railroad company; that said stock was frequently voted by the county through the county judge and is still held by the county; that it has never been tendered to the Louisville Southern or any representative of it; that the county of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds, and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1, 1892, and has not paid any interest on the bonds since that time; that an indemnifying bond was executed and delivered to

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Pearson, Trustee, about the time of the delivery of the 105 bonds, the terms of which are set out in the record; that this bond of indemnity was given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding that the condition precedent had been fulfilled by the Louisville Southern Railroad Company; that the Trust Company was, at the institution of the suit, the bona fide holder of the bonds mentioned, to the extent of $100,000, with the coupons thereon, having purchased same from the Investment Company of Philadelphia, at par and accrued interest, without knowledge or notice of any defects either in the execution or delivery of same, or of any defenses the county of Mercer had or might present to the recovery of the same.

The findings of fact also set out in full the form of bond executed by the county.

Judgment having been rendered upon these findings, a writ of error was sued out by the county of Mercer to the Circuit Court of Appeals.

Assignments of Error.

The following were the assignments of error:

1. That the court erred in giving judgment for the plaintiff upon the special finding of fact.

2. That the court erred in finding that the plaintiff was a bona fide holder for value and without notice of the coupons sued on or the bonds from which they were taken, or any of said bonds or any of said coupons.

3. That the court erred in refusing to find that the Louisville Southern Railroad Company had failed to comply with the conditions precedent to the validity of the said bonds.

4. That the court erred in failing to adjudge that under the act authorizing the subscription by Mercer County to the stock of the Louisville Southern Railroad Company the bonds from which the coupons were taken herein were void and of no effect.

5. That the court erred in holding that Isaac Pearson, Trustee, had the right to determine the question as to the performance by the Louisville Southern Railroad Company of the conditions precedent to the validity of said bonds.

6. That the court erred in holding that the county of Mercer was estopped to say that the said conditions had not been fulfilled, and was estopped to say that the said bonds were invalid and not binding.

7. That the court erred in refusing to admit the testimony offered and rejected as set forth in the bill of exceptions.

These errors need not be separately considered.

I.

The Power Given to The County of Mercer to Subscribe Stock and Issue Bonds was Not an Unlimited Power.

We believe it expedient to notice in the very first of the discussion of this case the fact that the Legislature of Kentucky refused to give to Mercer County any general power to subscribe stock in the Louisville Southern Railroad or to issue bonds in payment of such subscription. It was at one time considered very questionable whether a bare majority of the voters composing a municipality had the right to impose the burdens of taxation on the minority for the benefit of any kind of corporation. It has, of course, been long since settled that this can be done, but the power has always been recognized as a dangerous one, and efforts have been from time to time made to properly safeguard it. These, however, have proved so unavailing that in most of the States it has been found necessary to insert constitutional limitations as to this subject, and to positively prohibit such municipal subscriptions.

Any one who is acquainted with the history of Kentucky and of the counties adjacent to Mercer would know that they were for many years burdened down with debt contracted in the issue of bonds to railroads, not a rod of whose line had ever, in fact, been laid in the county.

The Legislature of Kentucky was aware of this history, and therefore, in passing this enabling act, guarded it with such restrictions as it was believed would certainly secure to the county that which was bargained for. It was the purpose of this law to provide that if a majority of the citizens of Mercer County should vote this subscription, they should not impose upon the minority that burden without an advantage deemed by the legislature to be the least which would be commensurate with the burden.

We find, therefore, in the act, provisions securing to the railroad and county the attainment of these objects:

First, before any subscription could be voted a certain number of persons must petition the county court to hold the election. The election having been had upon due notice, it was made the duty of the county judge to subscribe for the amount of stock thus voted.

Second, at once, upon this subscription being made, it became the duty of the county judge to execute the bonds of the county in payment therefor, but he was prohibited from issuing these bonds.

Third, the bonds so executed were to be placed in the hands of a depositary, to be held in escrow until the condition upon which the

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validity of the bonds was declared by the legislative enactment to depend should be fulfilled; and the law declared that the bonds should "not be valid or binding obligations" until and unless one of these legislative conditions was fulfilled.

Fourth, to make this more sure the technical word "escrow" was used, and a bond was to be required of the depositary in escrow to answer in damages in case of failure upon the part of the depositary to faithfully perform the duty imposed by law; this bond being for the benefit of the railroad and of the county in a way that we shall hereafter show.

The majority in favor of these bonds was a very small one—the vote in the affirmative being 1,683, and in the negative 1,250.

The legislature said in so many words: "The said bonds shall not be binding or valid obligations until the railway of said company shall have been so completed through such county that a train of cars shall have passed over the same."

The facts in this case show that the railroad has never been so completed.

We believe it to be quite clear that the purchase by the Louisville Southern of the Southwestern Road from Harrodsburg to a junction with the Cincinnati Southern can not be considered as in whole or in part compliance with this condition. It was not the purpose of the legislature to allow the majority of the people in Mercer County to tax the minority in order that a new company might buy an old road. But even assuming that this is not true, still, counting this purchased road with the road that was built by the Louisville Southern, the condition was not fulfilled.

And yet it is insisted, in the face of this law, that the bonds are binding and valid obligations of Mercer County.

The purpose of the law in having the bonds executed in advance of the compliance by the railroad company with the condition was to enable the railroad to certainly obtain the bonds when the condition should have been fulfilled. In order to safeguard Mercer County it was provided that notwithstanding the execution of the bonds in advance of the performance of the condition, still they should not be delivered until after its performance, and that they should not be binding or valid obligations until the condition had been absolutely performed.

We respectfully submit, in reference to this condition and the knowledge of all persons buying the bonds as to its being a prerequisite to their validity, that the opinion of the Circuit Court of Appeals is conclusive in its reasoning.

We make the following extract:

"The argument that this was a substantial compliance with the condition does not meet with our assent. The object of the act was to secure to Mercer County a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter it is not for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition. The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not deliver them until this railroad should be constructed through the county, are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad, and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind, intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration. The utterances of the Supreme Court upon the effect of restrictions and limitations in such legislation have been uniform, and announce a wise public policy. In Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, Mr. Justice Shiras, for the court, said:

"'That municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Sheboygan Co. v. Parker, 3 Wall. 93–96; Wells v. Supervisors, 102 U. S. 625; Claiborne Co. v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489; Young v. Clarendon Tp., 132 U. S. 340–346, 10 Sup. Ct. 107.'"

In Citizens Saving Association v. Perry County, 156 U. S. 693, the bonds were voted on condition, among other things, that the railroad company should locate its machine shops at Duquoin. The bonds were issued, but the shops were located at East St. Louis. The court held the bonds void. In reference to the condition, the court said: (Page 704.)

"We can not assume that the location of the company's machine shops at Duquoin was deemed by the voters to be a matter of no consequence. It may well be that the election turned upon the question of the location of those shops in the county at a named place."

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A fortiori must this doctrine obtain where the condition is one which has been prescribed by the only legislative authority authorizing the issue of the bonds, and where the whole election has proceeded upon the basis of this authority, coupled with this condition.

II.

The Purchaser is Bound to take Notice of the Law under which the Bonds are Issued.

This is so obvious a corollary from the proposition first stated that authority is hardly necessary to be cited. We, however, give an extract from the opinion of this court in Barnett v. Denison, 145 U. S. 139; which shows that it is sustained by many cases in this court:

"It is the settled doctrine of this court that municipal corporations are merely agents of the State Government for local purposes, and posses only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted; 1 Dill. Mun. Copr., Section 89; Ottawa v. Carey, 108 U. S. 110; that the bonds of such corporations are void unless there be express or implied authority to issue them; Wells v. Supervisors, 102 U. S. 625; Claiborne County v. Brooks, 111 U. S. 400; Concord v. Robinson, 121 U. S. 165; Kelley v. Milan, 127 U. S. 139; that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued. Ogden v. County of Daviess, 102 U. S. 634; Marsh v. Fulton County, 10 Wall. 676; South Ottawa v. Perkins, 94 U. S. 260; Northern Bank v. Porter Township, 110 U. S. 608; Hayes v. Holly Springs, 114 U. S. 120; Merchants Bank v. Bergen County, 115 U. S. 384; Harshman v. Knox County, 122 U. S. 306; Coler v. Cleburne, 131 U. S. 162; Lake County v. Graham, 130 U. S. 674."

III.

No Recital in a Bond is Conclusive unless it is of something which the Officer Certifying has the Legal Right to Certify.

In Davis County v. Dickinson, 117 U. S. 664, a county judge had endorsed a certificate upon the back of the bonds. The court said:

"The certificate is not a recital in the bond. It is not the act of the county court; is not under its seal nor signed by its clerk, but is simply the certificate of the person holding the office of judge of that court. Neither the statute nor the vote of the people nor the

order of the county court empowered him to make such a certificate or to determine the question whether the county court had exceeded the power conferred upon it. An officer's certificate of a fact which he has no authority to determine is of no legal effect."

So in Dixon County v. Field, 111 U. S. 94, the court, after commenting upon the leading case of Town of Coloma v. Eaves, 92 U. S. 484, says:

"If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

To the same effect is German Bank v. Franklin County, 128 U. S. 542.

And in Citizens Savings Association v. Perry County, 156 U. S. 703, this court says:

"And what was said in German Bank v. Franklin County, in relation to the registration of the bonds, is applicable to the present case: 'The registration of the bonds by the State auditor has nothing to do with any of the terms or conditions on which the stock was voted or subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16, 1869, or certify any compliance with the provisions of that act; and the certificate of registry merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued.'"

IV.

Recitals are to be Construed Naturally and Not in a Forced Way.

In School District v. Stone, 106 U. S. 186-7, this court said:

"This construction of the words employed in the bonds is characterized by counsel for the defendant in error as too narrow and technical. It may be a strict construction, and such, it seems to the court, ought

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to be the rule when it is proposed, by mere recitals upon the part of the officers of a municipal corporation, to exclude inquiry as to whether bonds, issued in its name, were made in violation of the Constitution and of the statute, of the provisions of which all must take notice. Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued, 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of bona fide purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recital fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound public policy forbids it. Where the holder relies for protection upon mere recitals, they should, at least, be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without authority, of law."

In the case at bar, as will be seen by reference to a copy of the bond printed in the appendix, the only recital is as follows:

"This bond is one of a series of 125 bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from 1 to 125; the same having been issued pursuant to the authority conferred upon the said county by an act of the Legislature of Kentucky, entitled 'An Act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886; and pursuant to an order entered by the county judge of said county in conformity with said act, subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000; which order was entered of record in said court on January 10, 1887."

The bond bears the same date, viz., January 10, 1887, and is signed County of Mercer by John W. Hughes, County Judge; Attest: Ben C. Allin, Clerk.

If we now turn to the act under which these bonds were issued, and which is also printed in full in the appendix, it will be found that it was an act approved May 15, 1886.

The recital shows that the order for subscription under the terms of that act was entered in the court January 10, 1887. The act

expressly provides that the election being held in pursuance of Section 2 of the law, as soon as may be thereafter, the county judge shall determine if a majority of the legal votes cast at the election were in favor of the subscription, and if they were he shall thereupon enter an order subscribing in behalf of the county to the capital stock of the railroad company in accordance with the terms of the proposition voted on, and shall thereupon cause to be prepared and executed the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk with his official seal affixed thereto, and the coupons shall be signed by the clerk.

The next section provides that the said bonds "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same;" at which time they shall be delivered to the said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county.

It is here provided quite as distinctly, it seems to us, as language can provide, that as soon as the order of subscription is made the county judge and county clerk shall immediately execute the bonds and deposit them with a trustee or trust company to be appointed by the county judge. And that it belongs to such trustee or trust company to hold them in escrow until the conditions set forth in the act have been performed.

If, therefore, the purchaser of these bonds read this law and believed this recital to be true, it knew that the county judge and county clerk had, immediately upon the order of subscription being made, executed the bonds; that is, signed and sealed them, and delivered them to a trustee or trust company to hold in escrow until the condition had been performed.

So far from its being the duty of the county judge and county clerk to withhold the execution of the bonds until the condition was performed, the act expressly made it their duty to execute them in advance of the condition being performed.

The purpose of this was obvious. It was to secure the railroad company in the bonds provided it should perform the condition, and not to leave the railroad company in a position where it would have to bring

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an action against the county authorities to compel them to execute the bonds; but to make sure that the bonds should be in the hands of a trustee or trust company in escrow for the railroad company, guarded by a covenant to be given by such trustee or trust company to secure the railroad company in the compliance with the full duty in the premises.

Again, there is no room for the contention that it was the duty or province of the county judge and county clerk (the only officers whose signatures are attached to these bonds and to the recitals contained in them) to determine whether the railroad company had performed the condition upon which alone the statute declared that the bonds should be valid and binding.

The act expressly made it the duty of the trustee or trust company to hold these bonds in escrow and deliver them to the railroad company when it should become entitled to them by the construction of the road through the county.

It was therefore beyond the power of the county judge and county clerk to make these instruments complete. In other words, it was expressly forbidden to them to make delivery of the bonds. (Young v. Clarendon Township, 132 U. S. 353.)

We therefore submit that the legislature has here lawfully imposed as a condition upon the validity of these bonds that they shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, and the defendant in error, being bound to take notice of the law under which the bonds were issued, knew of this condition upon their validity, and also knew that the county judge and county clerk had no right to make any recital in the bonds which should in any way certify that the condition had been performed.

It is also obvious that the natural construction of the recital is that the county judge and county clerk have done what the statute required them to do, and not what the statute forbade them to do; that they have executed the bonds by attaching their signatures and delivering them to a trustee or trust company to hold in escrow.

The facts of this case are that all this was done in the order in which it should have been done. We have, therefore, a case where the bondholder knew that the securities which he was buying could not have become the binding or valid obligations of Mercer County unless and until the railroad had been completed through that county; and where the purchaser of these securities knew that not only had not the county officers certified to the performance of this condition,

but that it was beyond their power to so certify; and where such purchaser knew that these securities had left the hands of the county judge and county clerk as incomplete instruments, and had been delivered to a third person—either a trustee or trust company—to hold in escrow and to be delivered only when the railroad company should have complied with the condition imposed by the legislature upon the validity of the bonds.

V.

In the Absence of a Recital by one Authorized to Make it That the Conditions Precedent to the Validity of Municipal Obligations Have Been Performed it is Open to the Municipality to Prove Their Non-Performance.

In the case at bar the allegation in the petition of the defendant in error is as follows:

"The said county judge caused said bonds to be deposited with one Isaac L. Pearson as trustee, to be held in escrow and delivered to the said Louisville Southern Railroad Company when it should become entitled to the same by the construction of its said railroad through the county of Mercer, and into or through the corporate limits of the town of Harrodsburg in Mercer County, and before receiving said bonds, said trustee gave bond, with good surety, approved by said county judge, for the faithful performance of its duty.

"Plaintiff further states that afterwards, and within the time provided for by said act, and by the terms of the proposition submitted and voted upon at said election, as hereinbefore set forth, the Louisville Southern Railroad Company did construct and so complete its said railroad through said county of Mercer that a train of cars could pass and did pass over the same; and did construct said railroad to and through the corporate limits of the town of Harrodsburg, and thereupon demanded a delivery of said bonds to the amount of $105,000." (R. 8.)

The petition then goes on to state what the trustee did, and concludes thus:

"Thereupon and thereafter the said trustee did deliver to the Louisville Southern Railroad or its assigns said bonds to the amount of $105,000 par value thereof; to wit, the said bonds numbered serially from 1 to 105, both inclusive; said delivery having been made about the month of August, 1888." (Record 8 and 9.)

There is no allegation that Pearson decided any thing.

The defendant, in its answer, traversed this allegation of the performance of the condition and also affirmatively alleged the non-performance by the railroad company of this condition. (Record 11 and 12.)

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The plaintiff, in its reply, again alleged the performance of the condition.

The court found not that the condition had been complied with, but that Isaac Pearson, Trustee, had decided that it had been complied with, and upon such decision had delivered the bonds to the railroad company.

As we understand it, it is the contention of the defendant in error that the trustee or trust company, to be appointed under Section 4 of this Act, had the right to conclusively determine the question of the performance of this condition, and that upon proof by a bona fide purchaser of these bonds that the trustee or trust company did in fact make such decision, and did, in fact, in consequence thereof, deliver the bonds, this raises an estoppel against the county the force of which is to absolutely prevent the county from showing the truth in regard to the matter in controversy.

We have, therefore, not a case where an effort is made to estop the county by a recital but by the decision of an individual to whom its bonds have been delivered in escrow; and the force of this decision is claimed to be such that although the act of the legislature under which the bonds were issued expressly provided that they should not be the binding or valid obligations of the county until the condition had been fulfilled, yet the decision of this depositary in escrow, though in parol and in no way recorded or recited, is the end of the matter.

No case has been cited either from this court or any other court holding that in the absence of a recital the municipality is estopped by proof *en pays* that a county officer has decided that a condition precedent has been performed. Such a view, it seems to us, if entertained by this court, must long since have found expression in some of the many cases where it is evident that county authorities having power to determine the existence of conditions precedent, and whose recital of the performance of them has been held conclusive, have determined the existence of such conditions precedent, and yet the determination, in the absence of the recital, has not estopped the county from showing the truth.

In Chambers County v. Clews, 21 Wallace, 321, this court said:

"We have held many times in relation to bonds of this character that where the persons appointed by law to certify that the preliminary requisites have been complied with do so certify, their certificate is conclusive in favor of the holder who, on the strength of such certificate, pays his money for the bonds, without notice of the defect or illegality. We have never, however, held that such defect or irregu-

larity could not be set up by the maker of the bonds where the suit upon them was brought by one who had not paid value for them or who had notice of the defect or irregularity."

If the determination is a finality we can not understand why it is not as conclusive in favor of one who believes it to have been erroneously concluded as it would be in favor of one who believes it to have been rightly decided.

In Nesbit v. Riverside Independent District, 144 U. S. 619, the court, it seems to us, decided this exact question. That was a suit upon district bonds. The defense was that the amount of the bonds, of which plaintiff had notice because of his ownership of them, exceeded the debt which the district could legally incur. The court held that having such notice, he could not recover. It was insisted, however, that the question was *res adjudicata*, as the same plaintiff had theretofore recovered upon certain coupons taken from the same bonds. The court, however, held that the causes of action were different. In the suit on the coupons the plaintiff had the right to rely upon the recitals in the bonds; that the statutory limit of debt was not exceeded, and by that means could estop the county from making the defense; but in the second case, the very ownership by the plaintiff of so many bonds itself affected him with notice that the statutory limit had been exceeded, and therefore the county was not estopped by a recital which the plaintiff, if he had examined the assessment roll, would have known was not true.

The court said:

"The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper, in the hands of a bona fide holder, from the burden of defense other than the lack of power growing out of the original issue of the paper and available as against the immediate payee. . . . In the suit at Des Moines no notice to the holder was shown. The recitals cut off the defense pleaded of original invalidity. In this action notice is proved, and an additional fact is put into the case, which makes a new question. The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here."

Now if the rationale of the rule is that the recital is mere evidence of decision, and the decision is the vital and binding thing, then the case just cited proceeded upon a radically erroneous view; because there was as much of decision in the one case as in the other. But in the one case the holder of bonds had the means which put him upon inquiry as to the correctness of the decision, or made it his duty

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to ascertain its correctness, while in the other the county, being estopped by the recital, there was no obligation upon the holder of the securities to further inquire.

It is to be noted that a large proportion of the cases cited by counsel for defendant in error in support of the position that the recital is mere evidence of decision, and that decision is as good as recital, are mentioned in the case of Coloma v. Eaves, 92 U. S. 484.

A careful examination, however, of the leading case of Buchanan v. Litchfield, 102 U. S. 278, will show that this court, after reviewing all of the cases preceding that one, settled the question that the fact that the bonds were issued is not in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued.

It is there pointed out that in every case previously decided the court had expressly called attention to the fact, which always existed, that there was such a recital as implied the performance of all conditions precedent by an officer who had power to determine their existence. The court italicizes from Town of Coloma v. Eaves, the language: "*their recital that it has been;*" and from Orleans v. Pratt, the language: "*recite the circumstances which bring them within the power;*" and from Kenicott v. Supervisors, the words: "With a *recital* that the election has been held, or that the fact exists or has taken place."

And the court calls attention to the cases of County of Moultrie v. Savings Bank, and Marcy v. Township of Oswego, as adhering to the rule announced in Town of Coloma v. Eaves, because of the *recital* in the bonds.

In the late case of Citizens Saving Association v. Perry County, 156 U. S. 701, this court said:

"But it is urged that the bonds having been executed and issued by those whose duties it was to execute and issue them, whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against bona fide holders for value. But this court, in Buchanan v. Litchfield, 102 U. S. 278, 292, upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a bona fide holder that the circumstances existed which authorized them to be issued."

This is said in a case where the validity of the bonds is challenged for a failure upon the part of the railroad company to build its machine shops within the county. The bonds were issued by officers who had power and whose duty it was to determine whether all of the conditions precedent had been executed prior to the time when they should issue the bonds. This is proved by the express decision of this court in Oregon v. Jennings, 119 U. S. 92, where it is said:

"Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the corporate authorities to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with."

This is further exemplified by a consideration of the various cases which have been decided by this court upon the proper construction and effect to be given to an act of the Illinois Legislature upon the subject of conditions attendant upon municipal subscriptions, approved April 16, 1869. These cases are Insurance Company v. Bruce, 105 U. S. 328; Oregon v. Jennings, 119 U. S. 92; German Bank v. Franklin County, 128 U. S. 543; Citizens Saving Association v. Perry County, 156 U. S. 700; Graves v. Saline County, 161 U. S. 360.

In two of these cases, viz., Insurance Company v. Bruce, 105 U. S. 329, and Oregon v. Jennings, 119 U. S. 75, the bonds were held binding upon the county, notwithstanding the failure to perform the conditions precedent.

In the case of German Savings Bank v. Franklin County, 128 U. S. 542, they were held invalid.

In the case of Citizens Savings Association v. Perry County, 156 U. S. 693, there were two series of bonds—one held valid and the other invalid. The same was true of the original issue of the two series of bonds dealt with in Graves v. Saline County, 161 U. S. 361.

The essential difference between the act of April 16, 1869, of the Illinois Legislature, and the act under consideration in this case, is strongly set forth in the case of Insurance Company v. Bruce, 105 U. S. 329. It is there showed that this act did not *require* the county to annex any conditions whatsoever to its subscription, and that it did not *require* bonds to be issued in payment of a subscription *prior* to the time that such conditions were to be performed. Therefore it was

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held that although the act did provide that "such bonds, subscriptions or donations shall not be valid and binding until such conditions precedent shall have been complied with," yet if the bonds were issued with such recitals as fairly indicated that they conformed to this act, such recitals would be held as importing either that no conditions had been annexed or that such conditions as had been annexed had been performed.

The Supreme Court of Illinois held in the case of Town of Eagle v. Kohn, 84 Illinois, 292 (decided in 1876), that this provision of the act of 1869 was to be rigidly enforced, and bonds issued in payment of subscriptions were void where precedent conditions had not been performed.

This court, in Insurance Company v. Bruce, *supra*, distinguished this case by pointing out that it did not appear that the bonds there in controversy had such recitals in them as to estop the county from saying that the conditions had not been fulfilled.

It may be claimed that the case of the German Savings Bank v. Franklin County, *supra*, is based upon the declared obligation of this court to follow Town of Eagle v. Kohn in that case, because the bonds were issued after the decision of Town of Eagle v. Kohn; but in the case of Savings Association v. Perry County, this court decided, as the Supreme Court of Illinois decided in Town of Eagle v. Kohn, in a case where there were no binding recitals. And that this decision was the independent judgment of this court is showed by the fact that Town of Eagle v. Kohn is not even cited.

We have dwelt at some length upon these various cases because, while strikingly different in some of their features from the case at bar, they are, in some other features, quite analogous. They are analogous, and we think decisive, because the bonds were always held void in the absence of a recital. They are not as strong as the case at bar because the Illinois act did not impose in and of itself any precedent conditions, while in the case at bar the precedent condition is imposed in the act itself.

Again, they are less strong than the case at bar because there was no obligation, under the act of 1869, to execute the bonds prior to the performance of the conditions precedent, while in the case at bar the bonds were required to be executed immediately upon the subscription being made.

This, again, precludes any possibility of the conditions having been performed between the date of the subscription and the date of the bonds themselves, and therefore precludes the possibility of any recitals in the bonds importing a compliance with the precedent conditions.

The cases under the act of 1869 are again less strong than this case because, under that act, or the acts supplementary thereto upon which the bonds were issued in the various cases above cited, it belonged to the county judge or supervisor and clerk to determine whether the conditions precedent had been executed, and therefore a recital in a bond signed by them could be taken as evidence of such performance. But in the case at bar it did not belong either to the county judge or the county clerk to determine the performance of the condition precedent upon which these bonds were to be valid.

In all of these cases it is apparent that the supervisor and clerk must have determined that the conditions precedent had been performed, and yet, wherever the recital failed the bond failed. In illustration of this we call attention to the very strong statement made by the county judge of Perry County, in Citizens Saving Association v. Perry County, 156 U. S. 696, in sending forward a certificate under the county seal and verified by his oath, to the auditor of public accounts. It can hardly be contended that there had not been a decision prior to the sending forward of this certificate, or that any court would have hesitated to find as a fact, from the issuing of the bonds by the county judge and the clerk, and from the certificate thus made by the county judge, that the county officers had decided that the conditions had been fulfilled.

In reason, we submit, it can not be held that the decision of an executive officer upon the question as to whether or no a condition precedent has been performed is conclusive upon the parties. The books are full of cases where railroads have brought suits for mandamus against county officers to require them to subscribe, insisting that the proper conditions precedent have been performed; but if the function of the county official is a judicial one, then it is obvious that mandamus will not lie.

There are many cases also in the books of injunctions against such county officials. Here again it is clear that the remedy could not be had if their function is a judicial one. Such cases as School District v. Stone, 106 U. S. 184; Northern Bank v. Porter Township, 110 U. S. 609; Carroll Co. v. Smith, 111 U. S. 557, upon being examined show that it is obvious that there had been a decision by the county authorities, but as the recital had not estopped the county to claim that such decision was wrong, it was allowed to challenge it.

There is a wide difference between estoppel by decision and an estoppel by recital. A decision is a final judgment and conclusive determination of some subject matter in dispute between parties by some court or tribunal having jurisdiction of the dispute and of the parties.

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The effect of a decision by such a tribunal is not due to any relation of agency borne by it to the parties, but is wholly independent thereof. It operates by force of the law creating the tribunal and conferring upon it the power to determine the question.

On the other hand, a recital is a representation or statement made by a party in person or by some authorized agent, concerning the existence of a certain state of facts.

Therefore, in all cases of municipal corporations, as they can act alone through authorized agencies, the effect of the representation depends upon the authority of the agent to represent the municipality as its agent and to speak for it.

The effect of his recital is dependent entirely upon his relation as agent to the municipality for which he speaks.

The recital is a positive declaration of what has been done. It is fixed, definite, and permanent—a part of the bond itself. It speaks to every purchaser of the bonds, and assures him that the facts are as they are recited to be.

In the case at bar it can not be claimed that there has been any record of any decision by Isaac Pearson, Trustee. If he made any, it rests *en pays*. So far from endorsing it upon the bonds so that the purchaser could see whether he had decided at all, and what he had decided, in order to determine the fact, and the extent of the decision, it has been necessary to resort entirely to parol proof. Whether he decided that the word "through" did not mean "through," or whether he decided that it was better for Harrodsburg not to require the railroad to build to Danville; whether he considered that it was to the interest of the county to waive the condition—of all this nor of any of it is there any record whatsoever. And it must be borne in mind, when it is complained that in such a case as this the court must disregard the performance of the condition precedent because it will be difficult for a purchaser to prove its performance, the very argument is bound to admit that it is necessary for him to prove that it has been decided that the condition was performed.

Suppose, in the case at bar, the defendant in error had proved that the railroad had been built through Mercer County, and the plaintiff in error had proved that Pearson had decided that it had not been built through Mercer County—in such a case the defendant in error would hardly have treated a contention that Pearson's decision was binding, in the face of the existence of the physical fact, as a serious contention.

This brings us to consider:

VI.

The Act did not Vest in Isaac Pearson, Trustee, the Power to Decide in Such a Way as to be Binding Upon Mercer County or the Railroad Company whether the Condition Precedent Had Been Performed.

This brings us again to the consideration of the terms of this particular statute.

The statute must be read in the light of decisions construing similar and different enactments. If the Legislature of Kentucky had had before it, when passing this act, the 105th volume of the reported decisions of this court, it would have found two cases illustrating the necessity of protecting municipalities upon the one side and the purchasers of securities upon the other from imposition and loss. The two cases we refer to are Insurance Company v. Bruce, 105 U. S. 328, and Lewis v. The Commissioners, 105 U. S. 739. Reading these cases it would have ascertained from the first of them that if a county was allowed by law to subscribe, with or without the exaction of conditions, and was authorized to issue its bonds prior or subsequent to the performance of such conditions, bonds issued by the county authorities authorized to issue them, containing no recital of the existence of conditions but a recital that the bonds were issued in conformity with the act, would be binding upon the county, even though the conditions had not been performed. This because it would be presumed that "to the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the constituted authorities of the town and the officers or agents of the company co-operated in putting out bonds, negotiable in form, with recitals that gave no intimation even that the subscription was conditional. The fact that conditions had been prescribed was omitted in recitals, full of every thing necessary to induce the public to buy bonds."

To prevent such an occurrence the legislature might reasonably have concluded that it was sufficient to make provisions which would avoid the existence of either of those elements which might possibly tend to the deception of a bona fide purchaser of the bonds of the county. This would be accomplished, first, by putting into this act an express declaration that the bonds should not be valid except upon

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the performance of a certain condition; and, second, by taking away from the authorities of the county any power to certify to the performance of this condition precedent by requiring the bonds to be executed immediately upon the making of the subscription, and to be deposited in the hands of some other corporation or individual, to be held until the condition was performed.

The legislature might have learned from Lewis v. Commissioners, 105 U. S. 740, that where bonds were authorized to be issued, with or without conditions, and to be placed in escrow, if issued with conditions, but not to be placed in escrow if there were no conditions, and bonds appeared on the market with full recitals in them such as they would legitimately have from all officers in case no conditions had been imposed in the subscription—such bonds would be valid and binding against the county because the purchaser would have the right to assume that no conditions had ever been imposed, and would have the right, therefore, to conclude that there had been no occasion to deliver them in escrow.

To avoid this the legislature, in the act under consideration, provided, as we have seen, that the bonds should not be issued except subject to the condition precedent, and that in any event they should be delivered to a trustee or trust company, to be held in escrow.

Therefore every purchaser of these bonds knew these three things: that they were not valid unless a certain condition precedent had been performed; that the fact that the county officers had signed the bonds indicated that at the time of such signature the condition had not been performed, and that the bonds had been delivered to a trustee or trust company in escrow.

This brings us, therefore, face to face with the question, Did the legislature mean that this trustee or trust company was to have the power to decide that the condition precedent had been performed in such a way as without any recital of such decision, and the same resting *en pays*, the county must pay these bonds regardless of the truth in reference to the performance of the condition?

The act provides in reference to the bonds, after saying that they shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same—that at such time they shall be delivered to the railroad company in payment of the subscription of such county, and that the county shall thereupon be entitled to receive certificates for the stock subscribed; and "the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to

the said railroad company when it shall become entitled to the same by the construction of its road through such county; provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety approved by the county judge, for the faithful performance of his or its duty in the premises."

There can be no doubt that under Young v. Clarendon Township, 132 U. S. 352–3, a municipal bond, like any other instrument, is invalid until it shall have been delivered by some one authorized to deliver it.

This act, while directing the county judge and county clerk to sign these bonds, took away from those officers any power to deliver them, except in escrow. What, then, is the power of a depositary in escrow?

In 1 Devlin on Deeds, p. 290, Sec. 312, it is said that an escrow is a delivery which may be made to a third person conditional on the performance of an act or the happening of an event; whereupon it is to be delivered to the grantee.

Again, at Section 321, p. 300: "Until the condition is performed the deed is of no more force than it would have been if the grantor, after signing and sealing the instrument, had deposited it in his own desk."

Again, at Section 322: "If the depositary deliver the deed without authority to do so from the grantor, or if the grantee obtain it fraudulently, without performing the condition, the deed is void."

This is clearly stated in County v. Emigrant Co., 93 U. S. 127.

In 6 American and English Encyclopedia of Law, page 866, we find the following:

"It is not necessary that the term 'escrow' should be used when an instrument is delivered to a third person, to prevent its taking immediate effect. That term evinces more clearly and distinctly than any other the actual intention of the parties; but where such intention is indicated in any other manner, effect will be given to it, unless the technical or legal phraseology employed by the parties renders it impracticable."

And at page 867 we find the following:

"When a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. The transaction is incomplete. It is not the grantor's deed until the second delivery. Even if the grantee obtains possession of it before the condition has been performed, yet it is not the grantor's deed, and he may avoid it by pleading *non est factum*. The grantee can not acquire the title by gaining possession of the deed by theft, by fraud,

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or by the voluntary act of the depositary, but only by performance of the condition. The depositary has no authority to waive such performance, and an unauthorized delivery by him of the deed which he holds in escrow is entirely ineffectual to pass the title. Until the performance of the condition the legal title is in the grantor; and that the condition upon which he was to receive the deed has been performed can not be inferred from the fact that the grantee has the unexplained possession of the deed. Although it is well settled that an escrow delivered without authority, or obtained fraudently, passes no title to the grantee or obligee, there is some conflict of opinion as to the right of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions; but the better opinion seems to be that such a purchaser acquires no title."

Now we do not think it necessary to cite the various cases given in that note and in the other text-books which support the language we have quoted. There is no room, so far as we have been able to find, for the contention that the decision of the depositary is even *prima facie* evidence of the performance of the condition, much less that it is binding. It is the performance of the condition which makes the instrument valid, and not the decision of the depositary. Nor is there any thing unusual in the case at bar in that the county court appointed the depositary. Nine times out of ten the depositary in escrow is appointed by the maker of the instrument.

It is, however, claimed that the rule in regard to a bona fide purchaser of negotiable bonds which have been put in escrow is different from that of a deed to land. But what exactly is meant by this? We submit that this is meant: The negotiable instrument does not carry upon its face any notice that it has ever been in escrow. Therefore if I deliver my negotiable note to a third person in escrow, to be delivered on the performance of the condition, and if my note is obtained from him by force, theft, or fraud, and put upon the market and sold to a bona fide purchaser he can enforce it against me because the negotiable instrument does not bear upon its face any notice to the effect that it has ever been in escrow. But in the case at bar these bonds have in effect a statement upon their very face that they have been delivered in escrow, and are not to be valid or binding until a certain condition has been performed; and there is nothing to represent to the purchaser that this condition has been performed beyond the bare fact that the bonds are in circulation.

We submit that there is no case which holds that the purchaser of a negotiable instrument, with notice that it has been in escrow, takes any title to it unless it also appears as a matter of fact that the condi-

tion has been performed. In other words, there is no difference between the non-negotiable and the negotiable paper delivered in escrow, provided the purchaser has knowledge of the fact that its original delivery was in escrow. Given such knowledge, the purchaser of the negotiable instrument is as much bound to ascertain the fact of the performance of the condition at his peril as is the purchaser of the non-negotiable instrument. In other words, the reason of the law exempting the purchaser of a negotiable instrument from inquiry as to the fact of performance of condition, is that the negotiable instrument does not bear on its face any evidence that it has ever been in escrow. But wherever it does bear such evidence, then the purchaser of the negotiable instrument is bound to ascertain the fact—the very fact—of the performance of the condition.

This court has decided many times in cases above cited that a delivery of negotiable bonds by officers authorized to decide conditions precedent does not in the absence of recitals bind the county.

An effort is made to construe this act as giving this depositary in escrow the power to conclusively decide, because in the first clause of this act Mercer County is authorized to pay for its subscription to the capital stock of the railroad in the negotiable coupon bonds of the county. It is said that the legislature could not have anticipated putting the purchaser upon inquiry as to the performance of this condition precedent when it allowed the county to issue negotiable bonds.

We think we speak with entire accuracy when we say that in all the cases in this court in which it has been held that bonds were void because of the failure to perform conditions precedent, the bonds were, in substance and effect, negotiable bonds.

The ordinary meaning of the word "negotiable" is "transferable by endorsement or delivery." It is contended that the legislature, by the use of this term, meant to provide for the safety of investors if any bonds were in fact delivered, by cutting off the defense of the county. This being the object, it is argued that any construction of the act is to be indulged which accomplishes the purpose. But the use of this word should be in no way a controlling factor in the construction of this act as to the power of the county to execute and issue these bonds.

This is a mere description of the character and quality of the bonds after they have become the valid contracts of the county, and does not make bonds which are invalid binding on the county. In other words, it confers no power not otherwise granted. The power to act must first attach, and is independent of the quality or character of the con-

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tract to be made. The act to be done was to issue negotiable coupon bonds, and the power to do this act was to depend upon the performance of the condition precedent provided in the statute. If the performance of this condition precedent operates as a limitation upon the power to do the act, it controls the doing of the whole act. Until and unless the condition precedent is performed, no power to issue or deliver any bonds is conferred at all. It is the performance of this condition precedent that invests the county with power to act, and it controls the question whether they are in fact bonds; for if they are not bonds, they are not negotiable bonds.

Again, the word "negotiable" was meant to imply a quality in these bonds in their transfer from hand to hand; in the title which one bondholder would get from another bondholder; and did not at all necessarily or reasonably imply that some other provision of the statute—as one that the bonds are not to be the valid obligations of the county in a certain contingency—is to be controlled by the word "negotiable." We submit that this whole argument from the use of the word "negotiable" is answered by the case of Ackley School Dis. v. Hall, 113 U. S. 140.

Again, if the legislature said in the first section "negotiable," it it said in the fourth section "escrow."

The word "escrow" is a technical word—a word of distinct legal significance. Whether accurately applied to bonds or not, in ordinary parlance, the legislature had the right to apply it to these bonds, and in applying it to these bonds must be assumed to have meant to use the word in its legal and technical significance. If not given this meaning, then none can be given—which is not true of the other word.

Indeed, if one, without the history of this case before him and the doubt that is thrown upon even the plainest proposition by ingenious argument, were to sit down to draw an act which would prevent county bonds from binding the municipality until and unless a certain named condition precedent should be actually performed, we believe it would be a most difficult task to find language which would more accurately and fully and completely express that thought than do the terms of this enactment.

It is argued that the bonds were contemplated to be valid if delivered by the trustee or trust company, because the depositary in escrow was required to give bond for the benefit of the railroad company and the county; and, it is said, how can such bond have possibly benefited the county?

It is not difficult to answer this question. In the first place, the county had the right to exact conditions other than those mentioned in

the act, and did in fact exact other conditions. For instance, it required that $20,000 of these bonds should be retained as security against the building of certain machine shops and a round house at Harrodsburg: yet as there was nothing on the face of the act to prevent the trustee from delivering these bonds, upon the performance of the conditions set forth in the act, if he had in fact so delivered the whole $125,000 of bonds after a building of the railroad through Mercer County, the bonds would have been binding upon the county. But the trustee would have been liable for damages in violation of his duty in the delivery of $20,000 of the bonds.

Again, the terms of the subscription gave the railroad five years in which to complete the line through the county. The act required that when the bonds should be delivered upon the performance of this condition, there should be cut from them the matured coupons. Suppose, however, that the trustee, after the performance of the condition, had delivered the bonds without cutting from them these coupons—the county might well have been liable for the coupons, but the trustee would have been liable upon his bond to the county for the failure to perform his duty.

In both the cases which we have supposed the bondholder would have taken the bonds without any notice upon the face of the act that they were invalid, it being assumed that the railroad had been built through Mercer County.

This argument, therefore, must fall to the ground.

Another argument is that it is difficult to tell what is the boundary line of Mercer County. We can hardly believe counsel for defendant in error serious in this proposition. It is no more difficult to tell the boundary line between Mercer County and Boyle County than between Kentucky and Tennessee, or Minnesota and Canada; and yet the courts take judicial notice of the exact position of this boundary line, and questions of the gravest import are dependent upon its being exactly deliminated.

It is to be observed that this act did not even require an individual to be appointed trustee. The language is constantly "trustee" or "trust company." This is another token of the legislative intent to make the depositary in escrow that and nothing else—not a judge, not a decider, but a depositary; one who would keep the bonds safely and would deliver them upon the happening of the event, and retain them until the happening of it.

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VII.

The County is not Estopped by any Other Facts in This Case from Contesting These Bonds.

We submit that there is neither a moral nor a legal estoppel against Mercer County in this case. If the court will examine the findings of the court as shown in Record 28, it will be perceived that the question there was whether this precedent condition of building the railroad through Mercer County should be waived. No doubt there were people in Mercer County, and especially at Harrodsburg, who preferred that this railroad be not carried through Mercer County and Boyle County to Danville, because of the rivalry between these two county towns; and it was easy enough to get a few people about the county-seat to make a great deal of noise on this question. But while considering those who did speak, the court must not be unmindful of the many living all over the county who had no opportunity to speak. Of these, 1,250 had entirely opposed the making of this subscription. It may be easily conjectured that of the 1,683 who voted for it, there would have been found a requisite number to make the minority a majority and the majority a minority if it had been proposed to waive this condition.

As for the County Court of Mercer County, it distinctly entered of record that it had no jurisdiction in the premises, and two members refused to vote at all.

The fact that the county for some years paid interest on these bonds is entitled to no legal weight. The Circuit Court of Appeals has so fully argued this question and cited the authorities upon it that we do not see that it is worth while for us to add any thing further to what that court has said. We refer especially to its opinion found on pages 61 and 62 of this record. The very recent case of Saline County v. Graves, 161 U. S. 373–4, enforces the legal proposition so clearly set out by Judge Lurton.

We respectfully submit that the judgment of the Circuit Court should be reversed, and that of the Circuit Court of Appeals allowed to stand.

Respectfully,

John B. Thompson,
Alexander Pope Humphrey,
Geo. M. Davie,
Counsel.

John W. Hughes,
Of Counsel.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may pay therefor, in the negotiable coupon bonds of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

Section 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident taxpayers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

Section 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested

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by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

Section 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such country that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however, That such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises; And provided further, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

Section 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

Section 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

UNITED STATES OF AMERICA.

$1,000. No. 105.

LOUISVILLE SOUTHERN RAILROAD AID BONDS.
COUNTY OF MERCER, STATE OF KENTUCKY.

The county of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1,000 on or before the 10th day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the 10th days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky, entitled "An Act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10, A. D. 1887.

If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the

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place of payment the amount of money necessary to pay the bonds named in said call.

In witness whereof, the county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

Done on the 10th day of January, A. D. 1887.

THE COUNTY OF MERCER, [SEAL.]
By JOHN W. HUGHES,
County Judge.

Attest: BEN. C. ALLIN,
Clerk.

FILED.
APR 6 1898
JAMES H. McKENNEY,
CLERK.

No. 243.

Brf. of Dickson & Bullitt for P. C.

MERCER COUNTY BOND CASE.

Filed April 6, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 243.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - - - - - - *Plaintiff in Error,*

VERSUS

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, - - - - - - - - *Defendant in Error.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

SAMUEL DICKSON,
THOMAS W. BULLITT,
COUNSEL FOR THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

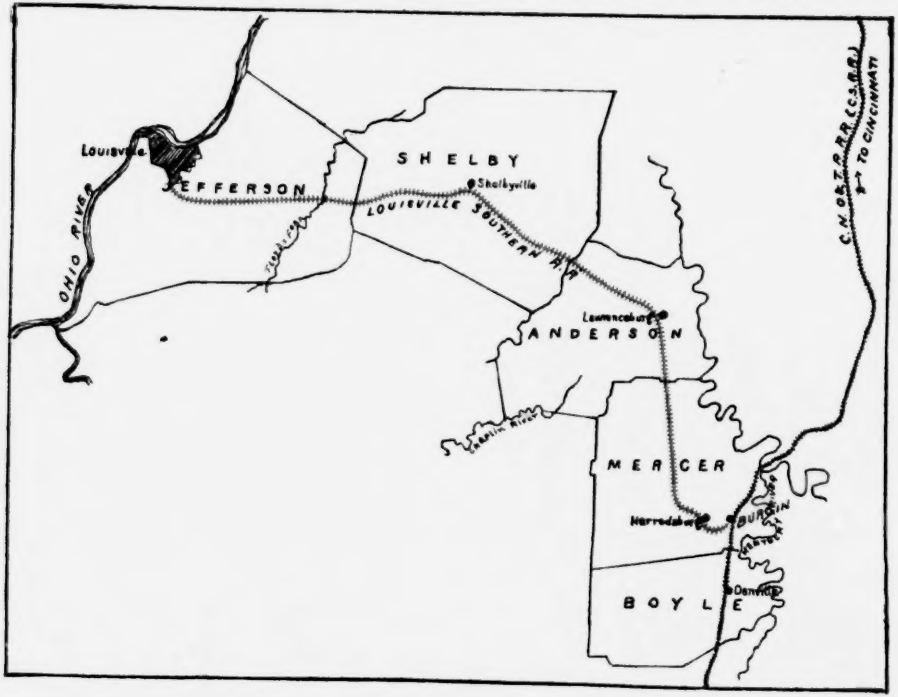
PAGES FOUND VERTICALLY

MAP OF LOUISVILLE SOUTHERN R. R. CO., WITH REFERENCE TO MERCER COUNTY.

DISTANCES FIXED BY FINDINGS OF FACT.

RECORD, P. 27.

Anderson County line to Harrodsburg,	15 miles
Harrodsburg to Burgin (S. W. R. R. Co.),	4.72 miles
Total length of Louisville Southern R. R. Co. in Mercer County,	19.72 miles
Louisville Southern R. R. to Boyle County line,	2 miles
Louisville Southern R. R. to Danville (Boyle County),	7 miles



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Supreme Court of the United States.

OCTOBER TERM, 1897. *No. 243.*

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - - - - - *PLAINTIFF IN ERROR,*

VERSUS

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, - - - - - *DEFENDANT IN ERROR.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN BEHALF OF THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

This action was instituted at law in the United States Circuit Court at Louisville, Kentucky, by the **Provident Life & Trust Company** of Philadelphia, as plaintiff, against the **County of Mercer,** State of Kentucky, as defendant. The case was heard (under a stipulation waiving a jury) before the Hon. John W. Barr as Circuit Judge, who made a special Finding of Facts, and upon the facts so found gave judgment in favor of the plaintiff. A writ of error was prosecuted by the defendant

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to the Circuit Court of Appeals, and the judgment of the lower court was reversed. Thereupon the Provident Life & Trust Company filed in this court its petition for a *certiorari*, which was granted (Record 62), and thus the cause comes on for hearing.

THE ISSUES.

The Provident Life & Trust Company sued upon the coupons annexed to $100,000 of bonds issued by the County of Mercer in part payment for a subscription of $125,000 to the capital stock of the Louisville Southern Railroad Company.

The **County of Mercer** defends upon the ground that the statute, which authorized the issue of bonds, provides that they "shall not be binding or valid obligations until the railway of the said company shall have been *so completed through* such county *that* a train of cars shall have passed over the same;" that this condition precedent has not been performed; *therefore* that the bonds and coupons are void.

For the **Provident Life & Trust Company** it is insisted:

I.

That it purchased the bonds, in the ordinary course of business, from a person who had previously purchased same from the Louisville Southern Railroad Company, paying therefor par and accrued interest ($101,197.22), and without knowledge or notice that any defense against said bonds existed or was claimed to exist.

II.

That the enabling Statute vested in the Trustee, named therein, the power and duty to ascertain and determine, before delivering the bonds, whether the conditions precedent to a rightful delivery thereof by him had or had not then been performed; that he decided they had been performed; and that, in favor of a *bona fide* holder of the bonds, for value, *his decision is conclusive.*

III.

That on the face of the bonds it was represented that they were issued "pursuant" to said enabling Statute; that the railroad was not extended beyond its present terminus at the express desire and request of the County of Mercer; that the county before, at and after the delivery of the bonds, publicly represented and declared that said conditions precedent had been

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fully performed; that it consented to and actively participated with the Trustee in their delivery to the Railroad Company; that it received and still retains as its own the capital stock in payment for which the bonds were issued; that it voted said stock on sundry occasions and on resolutions vitally affecting the organization and general welfare of said Railroad Company; that for several years it levied a tax for and paid regularly the interest on said bonds; and that by said conduct the County of Mercer is *estopped* to question the validity of said bonds.

IV.

That before the delivery of said bonds the railway was, in fact, *completed through* Mercer County *within the meaning and intent of the Statute.*

The Trial Court made the following

SPECIAL FINDING OF FACTS.*

(Rec. 16-33.)

In dealing with this finding of facts we have endeavored to arrange the facts chronologically, thus in some measure displacing the order adopted by the Circuit Court.

*The italics used here and elsewhere are ours.

The court finds:

1. That the County of Mercer subscribed for $125,000 of the capital stock of the Louisville Southern Railroad Company (Rec. 20–21), pursuant and subject to the conditions of the following Act of the General Assembly of the State of Kentucky, to wit: (Rec. 16–33.)

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per anuum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the

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duty of the county judge to order an election to be held in such county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation *until* the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the

county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: And provided further, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

2. That said subscription was made likewise pursuant to an Order of the Mercer County Court, confirmed by an election of the people as provided for in the Act; said Order extending the condition precedent, as prescribed by the Act, as follows:

> "The Louisville Southern Railroad Company shall comply with the conditions of the subscription herein contemplated *within five years* from the time any subscription is made, else said subscription to be void and bonds cancelled." (Rec. 18.)

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3. That pursuant to said Act and contract of subscription the County caused its 125 bonds for $1,000 each (aggregating $125,000) to be executed in the following form: (Rec. 7, 22, 23.)

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annnally at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886, and *pursuant to an order entered by the county judge* of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the

Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"Attest: "*County Judge.*

"BEN C. ALLIN,

"*Clerk.*"

4. That pursuant to said Act, D. L. Moore was on February 7, 1887, appointed by the judge of the Mercer County Court as Trustee to

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receive, hold, and deliver said bonds as required by Section 4 of the Act (Rec. 23); that said Moore accepted the trust and gave bond with approved surety that he would "faithfully perform his duty as Trustee as aforesaid in the premises" (Rec. 23); and the bonds accordingly on March 3, 1887, were deposited with him. (Rec. 22, 23.)

5. That before June 1, 1888, the railway was constructed and completed from Louisville, in Jefferson County, to and "through" the County of Mercer, from a point on its north (or Anderson County) line towards its south (or Boyle County) line to Harrodsburg, the county seat; that there it was connected with the short line of railroad extending from Harrodsburg to Burgin, on the Cincinnati Southern Railroad; that this connecting line was purchased and owned by the Louisville Southern Railroad Company, and by consolidation was made a part of its railway (Rec. 26); the following distances being fixed by said Finding of Facts:

From the Anderson County line to Harrodsburg, 15 miles; from Anderson County line

to Burgin, 19.72 miles; from Burgin to Boyle County line, 3 miles; from the nearest point on the railroad to the south (or Boyle County) line of Mercer County, 2 miles. (Rec. 27.)

6. That on June 1, 1888, "a train of cars moved by a steam engine passed over said railroad from Louisville through Harrodsburg to Burgin," returning the same day, and that since that date the said "railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern Railroad." (Rec. 26.)

7. That "the railroad thus constructed gave a railroad connection by the Cincinnati Southern Railroad either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee." (Rec. 27.)

8. That "about the time of the passage of the train of cars of said road from Louisville to Burgin, and for some time thereafter (that is, after June 1, 1888) there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had

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been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the taxpayers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him before his resignation as trustee. This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed." (Rec. 27.)

9. That "while this discussion (that mentioned above in paragraph No. 8) was going on and before Pearson, Trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern Railroad prepared to extend its railroad toward and to the town of Danville, Boyle County, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer County line." (Rec. 27.)

10. That "there was a movement made to have the Court of Claims of said county instruct the

trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the County Judge, Hon. John W. Hughes, and all of the justices of the peace of said county. The court after argument declined, as a court, to instruct the trustee as to his action, but upon motion of one of the justices they passed and had spread upon the records this resolution, viz:

> "The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of *opinion* that such *delivery should be made* and the construction of the railroad *not forced to the Boyle County line.*" (Rec. 28.)

11. That after this action of the county court and during the discussion aforesaid, to wit, on July 3, 1888, D. L. Moore presented his resignation as Trustee in the following letter: (Rec. 24.)

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"JULY 2, 1888.

"*To the Judge of the County Court of Mercer County:*

"Not being able, even with the advice of the best legal lights in this section, to make plain my duties as trustee of the Mercer County bonds, voted in aid of the Louisville Southern Railroad, and fearing to assume a duty not plainly laid down by the Act or the contract, I prefer to return the trust and deliver back the bonds in my custody rather than to proceed in the dark, and hereby tender my resignation.

"(*Signed*) D. L. MOORE."

12. That on July 3, 1888, the resignation of Moore was accepted, and L. D. Pearson was by order of the county court appointed in his stead as Trustee, "to hold said bonds and deliver same to the Louisville Southern Railroad Company" when the latter should have "complied with" the conditions precedent prescribed in the authorizing Act and the contract of subscription thereunder (Rec. 24), and that Pearson executed bond with approved surety, "faithfully to perform his duty" as Trustee. (Rec. 25.)

13. That "Pearson, Trustee, after his acceptance of this trusteeship DECIDED THE CONDITIONS PRECEDENT HAD BEEN PERFORMED by the Louisville Southern Railroad Company and

WAS ENTITLED TO THE DELIVERY of $105,000 of the bonds of Mercer County" (Rec. 28); also that a certain bond of indemnity was given to Pearson; but it was "given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding the condition precedent had been performed by the Louisville Southern Railroad Company." (Rec. 33.)

14. That pursuant to his said decision Pearson, Trustee, "on the — day of August, 1888, did deliver said bonds in the presence of Hon. John W. Hughes, County Judge of said County, and that the past due coupons on said bonds were cut off before delivery and were burned in the presence of said Hughes, and that there was delivered to said County at the time of delivery of said bonds a certificate for $105,000 of the capital stock of the Louisville Southern Railroad Company." (Rec. 28-29.)

15. That said capital stock was "accepted by said county," was thereafter "voted" by it on a number of most important resolutions (vitally affecting the organization and welfare of the Louisville Southern Railroad Company),

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and is still retained by said county. (Rec. 29–30.)

16. That the "County of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1, 1892, and have not paid any interest on said bonds since that time." (Rec. 30.)

17. That the "Provident Life & Trust Company was, at the institution of this suit, a *bona fide* holder for value of the bonds mentioned to the extent of $100,000, with the coupons thereon, having purchased same of the Investment Company of Philadelphia, and in that city, at par and accrued interest amounting to $101,197.22, without knowledge or notice of any defects, either in the execution or delivery of same, or of any defenses the County of Mercer has or might present to the recovery of same." (Rec. 33.)

ADDITIONAL FACTS ADMITTED BY THE PLEADINGS.

Under the Kentucky Code of Practice, which governs this action, any material facts alleged in the pleadings, if not specifically controverted, are conclusively presumed to be true. (Ky. Code, Sec. 126.)

In the petition it is alleged that Pearson, Trustee, *after he had been requested* by the railroad company *to deliver* the bonds,

"Notified the County Judge of said County, and notified the County Court, as composed of said judge and the magistrates of said County, of the demand which had been made upon him;" of

"His expectation and purpose to deliver the same unless directed or requested by said County Court or County Judge to withhold the delivery thereof;" that the County Court and County Judge

"Had full knowledge and notice of the extent to which and the direction in which said railroad had been constructed into and through said County of Mercer;" and yet that

"Neither the said County Judge nor said County Court made objection to the said delivery, but assented thereto and received for and on behalf of said County, and said County

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now holds said certificates for 1,050 shares of the capital stock of said Louisville Southern Railroad Company." (Rec. 9.)

These allegations are admitted by the answer, with the single exception that the county affirmatively "assented thereto." (Rec. 11.)

ARGUMENT.

Excepting real estate, it is probable that negotiable corporate bonds constitute the largest investments in this country. Of these, municipal bonds are the more important, as they are a favorite investment of persons unskilled in business who rely upon their public or governmental character as a voucher for their safety.

At the same time, because the personal credit of officials is not involved, we find occasionally the most unjust and unconscionable defenses interposed against the payment of municipal bonds.

The validity of such bonds has been frequently tested in this Court. The result is a long line of decisions wherein rules of clear and easy application have been laid down for the guidance of purchasers of municipal bonds.

These decisions have been so lucid, so forcible, and so consistent that they may well be regarded as **constituting a rule of property** in respect to such bonds.

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On the faith of those decisions the bonds in controversy were purchased: it is believed that tested by them, the bonds are valid securities.

That the Circuit Court of Appeals, in declaring the bonds void, has departed from and disregarded certain settled rules of statutory construction announced by this court, we now undertake to establish.

The following, we submit, is a correct and full statement (in so far as applicable to this controversy) of the

RULES OF STATUTORY CONSTRUCTION SETTLED BY THE SUPREME COURT:

I.

All persons dealing with municipal bonds are charged with notice of the **Constitution** and **Statutes** of the State under the authority of which such bonds purport to be issued.

Knox v. *Aspinwall*, 21 How. 539, 544.
Lake County v. *Graham*, 130 U. S. 674, 680.
Barnett v. *Denison*, 145 U. S. 135, 139.

II.

In every case of statutory authority to issue *negotiable* municipal bonds, it will (in the absence of express words to the contrary) be **conclusively presumed** that the statute **intends to establish and does establish** some standard of evidence or some authority whereby a purchaser may **ascertain clearly and authoritatively, at the time of the purchase,** whether the conditions exist or have been performed which justify their lawful issue.

The absence of such a provision in a statute would nullify its declaration that the bonds are to be "negotiable."

Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 487, 488.

III.

If a statute authorizing the issue of negotiable bonds, upon the performance of some condition precedent, shall (in lieu of the decision of some officer or tribunal) designate some fixed **standard of evidence** on the subject, such as

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a **public record** or the like, then purchasers of bonds are bound to resort for information to such **standard of evidence** and can not plead as against the municipality, either representations by its officers or a decision by any alleged tribunal.

Sutliff v. *Lake County Com'rs*, 147 U. S. 230, 235.
Dixon Co. v. *Field*, 111 U. S. 83, 93.
Lake County v. *Graham*, 130 U. S. 674, 683, 684.
Buchanan v. *Litchfield*, 102 U. S. 278, 289–292.

IV.

But if some other standard of authority be not designated by the Act, then the **person or persons** whose duty it may be to execute and deliver or ultimately to **deliver** the bonds will be **conclusively presumed** to be the tribunal designated by law to "ascertain and determine" whether the conditions have been performed which justify the issue of the bonds as negotiable securities.

The duty to make delivery of negotiable securities upon the performance of a condition precedent, involves and implies exactly the same necessity to ascertain and determine

whether the condition has been performed, as if the depository was expressly required to so determine.

Oregon v. *Jennings*, 119 U. S. 74, 92.
Coloma v. *Eaves*, 92 U. S. 484, 487–489.
Lewis v. *Commissioners*, 105 U. S. 739, 749.
Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 298, 299.
Andes v. *Ely*, 158 U. S. 312, 324.
Bernards Township v. *Morrison*, 133 U. S. 523, 527, 528.

V.

On behalf of *bona fide* purchasers for value a **decision** by such statutory tribunal that all conditions precedent have been performed is **conclusive** and **estops** the municipality from disputing the fact.

See authorities cited under No. IV, *supra*. See especially

Coloma v. *Eaves*, 92 U. S. 484, 491.
Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.

VI.

A **recital** by the statutory tribunal in the bonds that they are issued **pursuant** to the authorizing statute, is **sufficient evidence** to a

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bona fide purchaser that such **decision** has been made and concludes the municipality.

Andes v. *Ely*, 158 U. S. 312, 324.
Knox v. *Aspinwall*, 21 How. 539, 545.
Oregon v. *Jennings*, 119 U. S. 74, 93.
Insurance Co. v. *Bruce*, 105 U. S. 328, 332.
Livingston County v. *Portsmouth Bank*, 128 U. S. 102, 127.
Pana v. *Bowler*, 107 U. S. 529, 539, 540.
See also cases cited under Nos. IV and V, *supra*.

The estoppel, however, is created by and depends upon the **decision** and not upon the **recital**; the recital being only **evidence** of the decision.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Knox v. *Aspinwall*, 21 How. 539, 545.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 490, 491.
Kenicott v. *Supervisors*, 16 Wall. 452, 464.

VII.

If a municipal corporation is authorized to issue **negotiable** bonds, **provided** that certain **conditions precedent** have been complied with, and if it shall cause to be **recited** in such bonds or **shall otherwise represent** that such conditions have been performed, the municipality is

afterwards **estopped** to dispute the fact. [*See authorities cited under Nos. IV and V, supra*, pp. 22, 23.]

See also

Pendleton Co. v. *Amy*, 13 Wall. 297, 304–5.
Supervisors v. *Schenck*, 5 Wall. 772, 780.
Ray v. *Vansycle*, 96 U. S. 675, 687–8.
Meyer v. *Muscatine City*, 1 Wall. 384, 393.
Bissell v. *Jeffersonville*, 24 How. 287, 300.
Zabriskie v. *Cleveland, &c.*, 23 How. 400.
Moran v. *Commissioners*, 2 Black. 916.

On the faith of these rules petitioner made its purchase, and by them it is now proposed to test its rights and the decision of the Circuit Court of Appeals.

The positions affirmed on behalf of the Provident Life & Trust Company on pages 3, 4, *supra*, will be considered in their order.

FIRST POINT.

The Provident Life & Trust Company is a bona fide holder of the bonds for value without notice of defect or infirmity therein.

This point admits no further argument than that it is found as a fact by the trial court. (Rec. 33.) That finding concludes all parties. (*Runkle* v. *Burnham*, 150 U. S. 216, 225.)

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SECOND POINT.

The enabling statute vested in the Trustee, named therein, the power and duty to ascertain and determine, before delivering the bonds, whether the conditions, precedent to a rightful delivery thereof by him, had or had not then been performed; he decided they had been performed; and in favor of a *bona fide* holder of the bonds his *decision is conclusive.*

The Opinion of the Circuit Court of Appeals rejects this contention on the following grounds:

1. That the positive language of the authorizing statute *does not vest in the trustee* (named therein) the *power or duty to decide* whether or not the conditions precedent have been performed, upon the performance of which depends his duty to deliver the bonds, as *negotiable* securities, to the railroad company. (Rec. *page 63.)

2. That if such power may be inferred from the general language of the Act, yet the accompanying direction that the trustee is to hold the bonds "*in escrow*" qualifies it and shows that the vesting of such power was not within the legislative intent. (Rec. *page 65.)

3. That even if such power or duty *was* vested in the trustee, yet his decision is *ineffectual* because it is *not recited in* or *endorsed* upon the bonds themselves. (Rec. *page 60.)

The correctness of these positions will be considered in their order.

We maintain:

1. *The positive language of the Act does impose on the Trustee the duty and power of* **ascertaining** *and* **deciding** *before making delivery of the bonds, whether the conditions precedent to a lawful delivery by him have been performed.*

Waiving for the present the alleged limiting effect of the words "*in escrow*," we direct attention to the positive language of the Statute.

The *first* and *fourth* sections are alone material to this discussion.

The *first* section provides that the county may subscribe for capital stock and "*pay therefor* in the *negotiable* coupon bonds of said County."

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The *fourth* section provides:

> "The said bonds shall not be binding or valid obligations *until* the railway of the said company shall have been *so* completed through such county *that* a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, . . . and the County Judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided*, however, that such Trust Company or Trustee shall, before receiving such bonds, give bond, with good surety, approved by the County Judge, *for the faithful performance of his or its duty* in the premises."

We are to inquire what are the purpose and effect of these provisions of the Act.

It is submitted as perfectly clear that the declaration that the "bonds shall not be binding or valid obligations until," etc., *simply creates a condition precedent* to their lawful delivery.

If an issue of bonds is authorized, conditioned, however, upon the previous performance of a certain act, their issue before such performance

is unauthorized, and it necessarily follows that the bonds are void. Nothing is added to the force of the prohibition by declaring that in such case they shall not be valid or binding.

We are called, therefore, to deal with the simple case of bonds alleged to have been issued before the performance of a condition precedent—a case frequently considered by this court.

The language of the Act, if not controlled by the words "in escrow," fulfills every requirement of the rule which "conclusively presumes" that a Trustee, holding "negotiable" bonds, to be delivered upon a certain condition, is vested with power to decide finally whether or not that condition has been performed.

It is a *fundamental purpose* of the Act, that the bonds to be issued under it shall be *negotiable* bonds. They were to be used in payment for stock, and it is expressly declared that the bonds so used shall be "negotiable coupon bonds." The railroad company was not obliged to receive nor was the county entitled to offer in payment any but its negotiable bonds. If, therefore, the bonds should ever be issued they must, *when delivered*, be *negotiable* bonds.

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What is meant by negotiability? Clearly that the County, as maker of the bonds, should not, after their delivery by the lawful custodian, be able to make defense against them in the hands of a *bona fide* holder for value. If after such delivery of the bonds, in payment of the stock subscription, and their transfer to a *bona fide* purchaser, it should remain *always* competent to the county to defend upon the ground that certain conditions precedent had not been performed, as for example that a train of cars had not passed over the road before June 1, 1888, or that the road was not in a complete condition, then clearly the bonds *would not be negotiable.* The right to such defense contradicts the very idea of negotiability.

We ask attention to the clear and able presentation of this view by His Honor, Judge Barr. (Rec. 35.)

It follows inevitably, from the rule of statutory construction established by this court (as mentioned in Clause II, page 21, *supra*), that, in the absence of express words showing that there was no real purpose to make the

bonds negotiable, the Statute *intends to establish* and *does establish* some standard of evidence or some authority whereby a purchaser may *ascertain, clearly and authoritatively, at the time of purchase*, whether the conditions exist or have been performed which justify their issue—that is, whether the conditions precedent have been performed.

Critically examining the Act, what appears on this subject?

There are several conditions precedent to a lawful issue of the bonds.

The first is that a majority of the legal voters of the county shall have voted in favor of the subscription.

The determination of that question is expressly committed to the County Judge. To that extent we find the rule, as expressed by this court, clearly illustrated by the Act. With that point, however, the Trustee had no concern. It was to be and was decided before the bonds came into his hands.

The conditions precedent (if indeed there be more than one) upon which depended the right

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and duty of the Trustee to make delivery, were: (1) That the railroad should be "completed through such county." (2) That a "train of cars" should theretofore have passed over it prior to January 10, 1892, conditions indissolubly joined in a single sentence, viz: that the railway "shall have been so completed through such county that a train of cars shall have passed over same."

Knowing it was the legislative intent that a purchaser of the bonds could, when they were offered for sale, *ascertain clearly and certainly* whether these conditions had been performed and that the Act *provides a method* for so doing, it remains to inquire: **What is that method?**

No officer or tribunal, unless it be the Trustee, is authorized to decide the question. Neither the County Judge nor any county official was entrusted directly or indirectly with that power or duty. The bonds were placed in the hands of a trustee for the plain reason that it would not have been just to the railroad company to leave so grave a question to one of the parties to the contract.

If, then, the Trustee be not empowered to decide the question, it must be because *some other* fixed and certain standard of evidence, such as a public record or the like, is provided by the Act for the ascertainment and permanent preservation of the facts.

In *Dixon* v. *Field*, 111 U. S. 83, and in *Lake Co.* v. *Graham*, 130 U. S. 683–4, there was a *record*, which would have enabled any purchaser to ascertain certainly that the bonds were issued in violation of law.

But looking into this Act we utterly fail to find any provision for such ascertainment or record. The Act contains no requirement that the railroad company shall certify to the county court or to any court or officer that a "train of cars has passed" over its road; nor that the county or any official shall witness or make record of the fact. If a decision of the fact be not required of the Trustee, *then no provision is made* for its ascertainment; and a purchaser of the bonds must take them, if at all, at the peril of having the question raised five, ten, or twenty years after his purchase:

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when, perhaps, all evidence of the facts has been forever lost. It is probable that, at this time, the death of one or two persons would render any certain proof on the subject impracticable. To call such bonds "negotiable" is a mere trifling with words.

But it is insisted that the question at issue relates not to the "passage of a train of cars" over the road but to a completion of the road "through" the county—a very different question.

Even if those were two distinct conditions, still, indissolubly joined as they are in the Act, it will not, in the absence of express words, be presumed that the Trustee was invested with the duty of deciding the one and excluded from a right of decision as to the other. In fact, however, there is but one condition; the road must have been "*so* completed . . . *that* a train of cars shall have passed," etc. Completion of the road and the passage of a train are part and parcel of a single condition. The passage of the train is a component part, the essential and sole evidence, of completion. However the road might have been constructed,

to whatever point it might have been extended, until a train of cars had already passed over it, it would not have been "so completed" as required by the statute. To insist, therefore, that the Trustee was to decide conclusively as to one and was excluded from decision as to the other branch of the same condition seems to border upon the absurd.

But if it be conceded that these are severable conditions, still the question of "completion through the County" is clearly not less *in pais* than the other condition.

We waive the point that what constitutes "completion" of a railroad (if severed from the agreed evidence that a train of cars has passed over it) is a question of comparison and largely of opinion of which a "record" evidence is impossible.

The question whether the road, at a given date, had been extended "through the County of Mercer," to its *south line*, is one which can not be determined by any statute or known record.

It is, indeed, argued that the Statutes fixing the boundaries of Mercer County are presump-

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tively known to all persons. Conceding it, those boundaries are presumptively known to the courts. Yet if a controversy should arise between land owners over a division line, their tracts being separated by a county line, it would be a bold court which should attempt to settle the controversy by the statute and without a survey of the county line. But knowledge obtained by a survey has no analogy to the information contained in a record. Nothing is more common than a difference between the results obtained by surveyors. Knowledge of the Statutes, even if they accurately defined the boundaries, would not convey knowledge of the topography of the county.

But the fact is, the Statute defining the present south boundary of Mercer County gives absolutely no clear or certain indication of its location or direction. It was fixed by an "Act to establish the County of Boyle and for other purposes," approved February 15, 1842.

Its material sections are as follows:

"SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That from and after the first day of March next all those parts of

Mercer and Lincoln counties within the following boundaries, to wit: beginning at the point where the Casey, Mercer, and Lincoln lines meet; thence running a direct line to *Shelby's meeting house*, in Lincoln County; thence in a direct line to the *five-mile tree* on the main road leading from Danville to Stanford; thence a direct line to the mouth of Street's branch in the Hanging Fork; thence with the meanders of and down said fork to its mouth in Dick's River; thence down and with said river to a point thereon from which a due east and west line therefrom will include the *house, yard, and garden of the late Judge Boyle*, now owned and occupied by Robert Tilford, in Mercer County; thence from said point said due east and west line so as to include said house, yard, and garden; thence in a direct line to the *bridge across Harrod's Run*, on the turnpike road from Danville to Harrodsburg; thence to the *bridge across the Dry Fork* of Chaplin on the turnpike road from Perryville to Harrodsburg, and continuing the same course to the Washington County line; thence with the Washington and Marion east county lines to the north Casey line; thence with the Casey County line to the beginning, shall be, and the same is hereby, stricken from Mercer and Lincoln counties and erected into one distinct and separate county, to be called Boyle, in honor of Kentucky's distinguished jurist, John Boyle.

"SEC. 7. That the *surveyor of Garrard County* shall be, and he is hereby, appointed commissioner, with such assistants as he may deem necessary to employ, to *run and mark* the boundary lines of said county of Boyle, who shall be allowed three dollars per day for his services whilst engaged, and two dollars per day shall be allowed to each of the persons he may engage to assist him, payable out of the county levy of said county of Boyle."

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It is to be observed:

First. The Act recognizes that an actual *survey* is essential to fix the line, and the surveyor of *Garrard* County is directed to make the survey.

Second. The act points out no officer to whom the survey shall be returned; makes no provision for its record, and gives no direction as to how the line shall be marked.

Third. The Act gives no calls or distances, and now, after fifty-five years, it can not be judicially presumed that the "five-mile tree," "Shelby's meeting house," "house, etc., of the late Judge Boyle," and the various "bridges" are still standing or that a stranger would recognize them if found.

A person, by following the Act alone, and without other information, could not now make a new survey for himself and thus determine the county line.

If these landmarks could be ascertained, it would still require a survey to locate the line, and a survey is distinctly a matter *in pais.* It must be established by the testimony of the surveyor. *It does not prove itself as a record does.*

It thus appears, that, *unless by a decision of the Trustee*, the Statute prescribes *no method* whereby a purchaser of the bonds could ascertain, certainly and conclusively, whether the conditions precedent to their lawful issue had or had not been performed. He must purchase at the peril of having the question of their validity always open—even to the date of their maturity. If so, the bonds are not negotiable.

If the Statute really designed to make them negotiable, it follows conclusively that it vests in the Trustee the right and duty to decide finally whether the conditions precedent had or had not been performed.

In rejecting this conclusion the Circuit Court of Appeals rests its opinion upon the following grounds, independent of the qualifying effect of the words "in escrow," viz:

(*a*) "If he (the trustee) is empowered to make any determination whatever, the power is only *inferentially* granted" (Rec. *page 63);

(*b*) But this inference can not be indulged because the Act makes no provision "requiring an *indorsement* of such decision on the bonds, or the making of some other permanent record

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that so grave a determination had been made" (Rec. *page 63);

(*c*) And because the trustee was not the *agent* of the county; consequently it was not "intended that he should conclude the county through any agency for or in relation to it." (Rec. 58.)

We submit that at every step the opinion is in conflict with the decisions of this Court.

In respect to an "inferential" grant of power, it need only be observed that in the long line of decisions from *Knox* v. *Aspinwall* to *Andes* v. *Ely*, in no instance (except *Chaffee* v. *Potter*, 142 U. S. 355, 362, and *Lewis* v. *Commissioners*, 105 U. S. 739, 742) was the official, whose decision was accepted as conclusive, charged in express words with the duty or power of making such decision. That power was invariably "inferred" from the fact that the designated official was charged with the duty of delivering negotiable bonds upon the performance of certain conditions precedent, and that *no other provision was made* for determining whether and when they had been performed.

The point was expressly raised and decided in *Knox* v. *Aspinwall*, 21 How. 539, 544; *Bissell* v. *Jeffersonville*, 24 How. 287, 298, 299, and *Oregon* v. *Jennings*, 119 U. S. 74, 92.

In *Coloma* v. *Eaves*, 92 U. S. 484, 489, the Court, quoting and approving *Commissioners* v. *Nichols*, 14 Ohio St. 260, say:

> "A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions to complete a certain railroad, and imposing upon them the duty of *delivering* the bonds when such provision had been made, without indicating any person or tribunal to *determine* that fact, *necessarily delegates that power* to the commissioners; and if delivered improvidently the bonds will not be invalidated."

In the case at bar the statute imposed upon the Trustee the duty of delivering the bonds *when* the conditions precedent were performed, without otherwise indicating any person to determine that fact; it follows that the statute "necessarily delegates" the power of decision to the Trustee.

In the same case, at page 488, it is said:

> "At some time or other it is to be ascertained whether the directions of the act have been fol-

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> lowed. The *duty of ascertaining* was plainly intended to be *vested somewhere*, and *once for all;* and the *only persons* spoken of, who have any duties to perform respecting the election and action consequent upon it, are the town clerk and the supervisor. . . . *It is a fair presumption*, therefore, that the Legislature *intended* that those officers, or one of them at least, should *determine* whether the requirements of the act . . . had been met."

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, Mr. Justice BREWER said:

> "It is urged . . . that the statute does not *in terms* give them authority to determine whether the preliminary conditions have been complied with.
>
> "While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet *such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named.*"

The second objection, that the Act *makes no provision* that the Trustee's decision should be "endorsed" upon the bonds, or otherwise made a matter of record, is equally untenable.

This, indeed, is a most startling innovation upon the law governing these securities.

So far as we can recall, in only two of the cases (*Lewis* v. *Commissioners*, 105 U. S. 739, 742, and *Chaffee* v. *Potter*, 142 U. S. 355, 364), decided by this Court, was there a requirement in the enabling Act, that the decision touching conditions precedent should in any way be made a part of the bond, or a matter of record. The "recital" of such decision in the bonds has uniformly been a purely voluntary act not required or suggested by the statute.

The third suggestion in the opinion, that because the Trustee was not an "agent" of the county his powers are to be considered less ample than would be similar powers vested in a county officer, is founded in a total misconception of the decisions of this Court.

A review of these will demonstrate that the conclusive force given to decisions by county officials, respecting conditions precedent, is in no sense whatever based upon any *agency* for the municipality, but rests exclusively upon the fact that the legislature has created a "tribunal" and vested in it the authority to "decide" a given question.

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The power of the tribunal and the force of its decision are alike *derived from the Act*, and not from the consent or direction of the municipality.

In *Bissell* v. *Jeffersonville*, 24 How. 287, 299, the court refers to the "jurisdiction of the subject-matter" as vested by the Act in the Common Council; and in *Coloma* v. *Eaves*, 92 U. S. 484, 489, the town clerk is referred to as the "arbiter."

In none of the cases has the conclusiveness of the decision and recital been based upon any supposed *agency* of the person authorized to decide; it has always been because of a power delegated or vested by the Act itself.

See quotation from *Coloma* v. *Eaves*, pp. 41, 42, *supra*.

See also:

Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.
Northern Bank v. *Porter Township*, 110 U. S. 608, 617.

But the following cases seem to settle the question beyond controversy:

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, the persons charged with execut-

ing and delivering the bonds *were not county officials* at all. They were special "commissioners" appointed by the Circuit Court of the county—exactly as the trustee herein was appointed by the County Court. The point now made for the county of Mercer was specially urged in that case. It was *held:* that the power to decide being "inferentially" granted *by the statute*, the county was estopped and that no question of agency was involved.

In *Andes* v. *Ely*, 158 U. S. 312, 324, the persons authorized to issue bonds and "*inferentially*" presumed to have authority to decide conclusively as to conditions precedent *were not county officials at all.* They were "special commissioners" appointed under authority of the enabling act.

In this respect those cases are exactly analogous to the case at bar.

We submit that the positive language of the Statute indicates a clear intention to impose upon the Trustee the duty and therefore the power to ascertain and to decide conclusively, "once for all," whether the conditions had been performed upon which depended his duty to withhold or to make delivery of the bonds.

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It remains to inquire whether the statute contains any qualifying terms which nullify this expressed intention.

But one expression is relied on as having that effect, to wit: that the bonds are to be held by the Trustee "in escrow."

We submit:

II. *The words "in escrow" do not so control or limit the rest of the Act as to show that the bonds were not to be made negotiable or that the Trustee was not empowered to decide conclusively as to the performance or non-performance of the conditions upon which, in express terms, it is declared to be his duty to make or to withhold delivery of the bonds.*

The Circuit Court of Appeals concedes that the term "in escrow" is strictly applicable only to deeds or similar writings obligatory: that it is not technically applicable to negotiable instruments.† (Rec. *page 65.)

†It is Text-book law that where a deposit is made "in escrow" of negotiable paper, the defense of an improper delivery or failure of the contingency, though good against the payee, will not avail against a *bona fide* holder for value. (6 Am. and Eng. Enc. of Law, pp. 867–869, citing *Vallett* v. *Parker*, 6 Wend. 615; *Fearing* v. *Clark*, 16 Gray, 174; *Clarke* v. *Johnson*, 54 Ill. 296.)

It is apparent, therefore, that there is nothing in the mistaken and colloquial use of the phrase "in escrow" to detract from the peculiar position of authority and responsibility conferred upon the trustee—itself a term involving the reposing of confidence.

But the court declares that the direction to hold in escrow "implies that the term was used just as it would be used if the subject matter of the deposit was a deed." (Rec. 59.)

The court ignores, as entitled to no weight whatever, the fact that at and before the delivery of the bonds all parties *construed the Act* as requiring that the road should be completed through the County only to the Cincinnati Southern Railroad; that the County Court (the sole fiscal agent of Mercer County), the County Judge, and the people believed, represented, and urged that the conditions had been performed and that the bonds should be delivered; that the road was stopped short of the Southern line of the County solely by reason of the urgent desire and request of the County itself; and that by reason of these facts the bonds came upon the market and the Provident Life and Trust Co. was induced to purchase them.

The Court insists that the words "in escrow" peremptorily forbid a consideration of any question save one: Was the condition of the escrow literally performed?

To that view we now direct attention.

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Manifestly, as conceded by the Court, we are not bound to construe the word "escrow" according to its strict technical definition at common law. Having been taken by the legislature out of its legitimate sphere, evidently in a colloquial sense, we must look to the context to ascertain the sense in which it was used. But the context embraces the entire act and its general purpose. There is no greater reason why the words "in escrow" shall limit or annul the other expressed purposes of the Act than that those words shall be qualified by its other provisions. The Act must be read so as, if possible, to make all its parts consistent. A reading which accomplishes that result is the true reading.

Giving to the words "in escrow" the meaning attributed to them by His Honor, Judge Barr, in the Circuit Court, all parts of the Act are consistent and harmonious. The "negotiability" of the bonds is preserved; the conditions of the escrow are required to be fulfilled; and a tribunal is recognized whose duty it is to *investigate, ascertain, and determine conclusively whether they have or have not been performed.*

As construed by the Circuit Court of Appeals, *two of the most important provisions* of the Act are completely *nullified.*

The argument to show that the construction given the Act by the Appellate Court nullifies the fundamental purpose to make the bonds negotiable has been made above and will not be here repeated. The decision itself settles that question. The Provident Life and Trust Co. purchased the bonds in open market, from a previous purchaser; it paid for them $101,197.22; it purchased *bona fide* without notice of any alleged defense; yet at the instance of the maker, because of the alleged non-performance of a condition precedent, the bonds in its hands are held to be void. Such bonds can not be termed "negotiable" securities.

The other provision of the act nullified by the Court of Appeals is that which requires that the Trustee "shall, before receiving such bonds, *give bond* with good surety, approved by the County Judge, for the *faithful performance of his or its duty* in the premises."

The opinion of Judge Barr gives full effect

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to this important provision. Under the opinion of the Circuit Court of Appeals it is useless and without meaning.

Let us consider just what this "bond" provides for.

To **hold** the bonds **until** and to **deliver** them **when** the road was completed was the **sole duty of the Trustee**; the bond was for the "faithful performance" of that duty. In its performance and therefore in the bond, the county and the railroad company had an equal interest.

That the County had an important interest to be protected is emphasized by the fact that the trustee is to be named and his bond is to be approved by the County Judge.

What, then, was the true nature of the County's interest? Against what unfaithfulness was it to be protected? If the Act be construed according to its plain natural import and in accordance with the decisions of this Court, its meaning is clear and simple. The trustee was vested with the power to decide whether and when the conditions precedent to the rightful delivery of the bonds were per-

formed, and thereby to put them forth as *negotiable* instruments. In that fact is found a full and sufficient reason for requiring of him a bond for the protection both of the County and of the Railroad Company. For a clearly wrongful or fraudulent delivery or refusal to deliver, the Trustee and his sureties would be liable to the party injured.

But, under the opinion of the Court of Appeals, the Trustee's bond was as to the County a useless and senseless formality. *There is under that opinion no conceivable state of circumstances under which the County could ever recover one dollar for a breach of the Trustee's bond*—unless *perhaps* for court costs in some litigation. But to hold that the bond refers merely to costs rather than to the substantial duty imposed on the Trustee, is simply to disregard the plain import of language.

A delivery of the bonds *before* completion of the railroad, whether made negligently, by collusion or with a view to embezzlement, would inflict no injury upon the County; because (according to the Circuit Court of Appeals) the bonds being in escrow are void

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in the hands of even *bona fide* holders. If lost, converted, or embezzled *after* completion of the road the Railroad Company might have a cause of action on the trustee's bond, but *the County would not.* The Trustee being the depository created by law and by consent of both parties, neither could recover from the other for his misconduct. In case of such default the Railroad Company could resort for compensation only to the Trustee and his sureties.

The Circuit Court of Appeals does not point out wherein the County can possibly have an interest in the trustee's bond except possibly in the matter of costs. It, however, concludes a brief reference to it in these words (Rec. 61):

> "It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement, or any willful refusal to faithfully perform the trust."

Precisely what effect "the negotiable form" of the bonds was supposed to have, in view of the opinion that the Act *does not* confer negotiability, we are unable to perceive.

It has already been shown that, on the basis of the Court's opinion, the bond offered no protection to the County (because the County needs no protection) in the matter of "negligence, conversion or embezzlement."

It remains to observe that, under that opinion, there could be no "willful refusal to faithfully perform the trust;" for the simple reason that the Trustee, absolutely, could have no duty *to* perform. If the Trustee had no *power* to decide whether the conditions had been performed, clearly he was subject to no *duty* to decide. If he was under no duty to decide, he was *under no duty to make delivery of the bonds;* for, by the express terms of the Act, delivery could not rightfully be made until the question of conditions performed was decided and conclusively settled.

If the Railroad Company should make demand for the bonds, on the ground that it had fully performed the condition precedent, the Trustee might rightfully respond: that having no power to decide, he was under no duty to investigate or inquire into the matter; investigation would be a useless labor; yet that he

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could not rightfully be required to subject himself and sureties to liability on his bond by possibly making a wrongful delivery; therefore that he should do nothing.

To refuse to deliver the bonds until ordered to do so by a Court, in a formal litigation, would be the only safe course to be pursued by the Trustee. But manifestly the Act did not contemplate such a course. In express terms it requires that when the conditions have been performed, the bonds "shall be delivered" *by the Trustee;* that duty is made compulsory. To perform, he must, of necessity, decide whether the conditions justifying delivery have or have not been performed.

Bond was required of him because of this grave and responsible duty; because of the trust reposed in him; because by a negligent or fraudulent putting forth or conversion of negotiable securities he might inflict injury upon either the County or the Railroad Company. Deprive him, by construction, of that trust, that confidence, that duty and power, and his bond is a formality without sense or meaning.

The canons of construction, established or recognized by this Court, will not tolerate such trifling with the language and purposes of an Act, whereby the legislature of a State invites the investment by strangers of $125,000 on the public faith.

But the Circuit Court of Appeals declares that even if the Act vests in the Trustee the duty and power conclusively to decide whether the conditions precedent to a rightful delivery of the bonds have or have not been performed, yet in this case his decision is ineffectual because it is not *recited in* or *endorsed upon* the bonds themselves.

This we conceive to be in radical conflict with the decisions of this Court; and, on the faith of the latter, we submit:

III. *The decision of the Trustee, that the conditions precedent had been performed, is not, by the statute nor by the decisions of this Court, required to be* recited in *or* endorsed upon *the bonds, and is not rendered ineffectual by the failure so to recite or endorse same.*

The Kentucky Statute certainly contains no requirement, expressly or by inference, that the

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decision of the Trustee shall be recited in or endorsed upon the bonds. Clearly a "recital" in the bonds was not contemplated: for they were to be placed in the hands of the Trustee fully executed before the work of construction was completed: or perhaps even before it was commenced. The Trustee was not a party to the bonds; had to affix no signature thereto; and could not therefore make any recital in his own name. The word "endorse" or its equivalent does not appear in the Act. The absence of such recital or endorsement, therefore, implies no default of statutory duty by the Trustee; it gave no notice to purchasers of the bonds that there was an irregularity in their issue.

But let us examine the question in the light of the decisions of this Court.

We will hereafter insist that, in effect, the decision of the trustee is "recited" in the bonds in controversy; but, for the purpose of testing the accuracy of the opinion under discussion, we shall consider it as if there were no such recital.

That there may be no misconception as to

the exact position of the Circuit Court of Appeals, we quote from the opinion (Rec. 53, 54):

> "Where railroad construction bonds have been issued in violation of the law under which authority was granted, THE MUNICIPALITY HAS NEVER BEEN HELD ESTOPPED to defend upon that ground, UNLESS REPRESENTATIONS APPEARED ON THE BONDS THEMSELVES importing full compliance with the conditions imposed by the enabling Act. The estoppel has been a CONSEQUENCE OF RECITALS or indorsements, etc."

In the case of the *Louisville Trust Company* v. *Louisville, New Albany & Chicago Railway Co.*, more recently decided (43 U. S. App. 550, 608), now also in this Court on a writ of *certiorari* (164 U. S. 707), the Circuit Court of Appeals refers to its opinion in this cause, and to that alone as authority, and says (TAFT, C. J.):

> "It now appears to be settled that in such cases the City or County can not be estopped to show irregularities in the issuance of the bonds UNLESS THERE ARE EXPRESS RECITALS of full compliance with statutory requirements, signed by an officer who has the implied or express authority by virtue of the statute to pass upon the question of compliance and to speak for the public corporation or *quasi* corporation issuing the same. *Mercer County, Kentucky*, v. *Provident Life & Trust Co., of Philadelphia*, 43 U. S. App. 21, 34, 37."

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That opinion goes one step further than the opinion in this cause, to wit: In declaring that even an *endorsement of the Trustee's decision* would be ineffectual, and that it must appear by way of "express recital" in the bonds themselves.

The importance of this declaration by the Circuit Court of Appeals can not be overestimated. Vast lines of securities regarded to-day as safe will be avoided by it if sustained by this court.

We submit that the opinion is not supported by any decision of the Supreme Court, and is in conflict with the reasoning and grounds upon which its various decisions rest.

The question, in express terms, has perhaps not been passed on by this Court; but its determination is *necessarily involved* in numerous decisions made by it.

In all but a few cases before this Court, the bonds in fact recited full compliance with the law. In every such case, where the persons issuing the bonds were authorized to decide as to conditions precedent, the recital was held to be equivalent to a decision and *therefore* conclusive. Where such authority did not exist, the recital was held to be valueless.

In the few cases of bonds without recitals it has appeared *either* that no decision had been made, *or* that the decision relied on was made by one without authority to decide. Here, for the first time, we encounter the case of one having (or assumed to have) authority to decide, and having actually decided that all conditions precedent were performed, and yet his decision is not recited in or endorsed upon the bonds.

A review of the decisions of the Supreme Court will show that the recital of the performance of conditions precedent, depends for its value exclusively upon the fact that it is the *evidence of* and is *equivalent to* a decision by the proper official; and that such *decision*, if in fact made, is equally conclusive although not incorporated in the bonds.

1. In only one case, so far as we can recall (*Lewis* v. *Commissioners*, 105 U. S. 739, 742), did the enabling Act require or contemplate that the bonds should contain either a recital or an endorsement as to the performance of conditions precedent; in every case the recitals have been purely voluntary.

It can not therefore be said that the Supreme Court has given effect to such recitals because of any supposed statutory force. Recitals have been held conclusive simply because they are the *evidence of a decision*, which decision is authorized or required by the statute in order to confer upon bonds a *negotiable* character.

2. That it is the *decision* by the proper official and not its *recital or endorsement* which confers a negotiable character on bonds, issued in fact before the performance of the conditions precedent, may be established by reference to the reasoning of this Court in many cases.

In the leading case of *Knox* v. *Aspinwall*, 21 How. 539, 544, the Court, after declaring that the conditions precedent had not been performed, said:

> "This would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to *determine* whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this Board."

Referring to the fact that "the bonds on their face import compliance with the law," the Court said:

> "The purchaser was not bound to look further for *evidence* of a compliance with the conditions to the grant of the power."

Manifestly in this great case the *decision* of the county officials is that which was held to give negotiability to the bonds; the recital was merely *evidence* of that decision.

In *Bissell* v. *Jeffersonville*, 24 How. 287, although the bonds contained the usual recital, the Supreme Court in its opinion does not in the slightest degree rely upon that fact. The opinion rests exclusively on the fact that the enabling Act committed to the Common Council of Jeffersonville *jurisdiction* to decide the question as to the performance of conditions precedent, and that in behalf of innocent holders of bonds its decision was conclusive. Dealing with the defense that the decision of the Council was in fact false, the Court said:

> "It only remains to consider the *effect of that determination*. . . . It must have been understood by the legislature that the bonds were to

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> be received by the company in payment for the stock, and used as a means of borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the Act, it contemplated that the bonds should be issued before it was *conclusively determined* that the requisite number of legal voters of the city had petitioned the Common Council. . . . Duly certified copies of the record of the proceedings (of the Council) were *exhibited to the plaintiffs at the time they received the bonds*, showing to a demonstration that a further examination of the subject would have been useless."

The judgment of the lower court was reversed, because it had admitted evidence tending to show that the decision of the Council was untrue in fact.

Manifestly the negotiability of the bonds was made to rest not upon the recital in the bonds but on the fact of the decision.

In *Marcy* v. *Oswego*, 92 U. S. 637, 639, Mr. Justice STRONG said:

> "Where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their *decision is final* in a suit

by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive."

In *Coloma* v. *Eaves*, 92 U. S. 484, 490, the Court said:

"The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. . . . Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for *evidence* of the existence of things *in pais*."

In the same opinion the Court has drawn the very distinction for which we contend. Quoting from Dillon on Municipal Corporations, to the effect that the "*determination* of a matter *in pais*" by the tribunal "invested with power to decide whether the condition precedent has been complied with" is conclusive, the Court say, that "this is a very cautious statement of the doctrine. It may be restated in a slightly different form," and continue (p. 491):

"Where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds

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> issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, *for the recital is itself a decision* of the fact by the appointed tribunal."

The necessary inference from this language is, that the Court approves the "cautious statement" of Judge Dillon that the *decision* is conclusive, and then goes a step further and holds, that even though there has been no express determination, yet a recital estops the county because, in favor of a *bona fide* holder, *it is a decision.*

In *Kenicott* v. *Supervisors*, 16 Wall. 452, 464, the Court said it was settled that,

> "A recital that the election has been held, or that the fact exists, or has taken place, will be sufficient *evidence* of the fact to all *bona fide* holders of the bonds."

In each of these cases *the fact of the decision* is declared to be the controlling fact; the recital is merely referred to as the *evidence* or certificate of the decision; in neither of them is there a suggestion that the decision depends for its conclusive force upon its recital in the bonds. The entire ignoring of the fact of recital in *Bissell* v. *Jeffersonville*, coupled with the decla-

ration that proceedings of the Council "were exhibited to the plaintiffs at the time they received the bonds," conclusively establish that the mere recital was deemed unimportant except as evidence of the fact of decision.

The authorities referred to by the Circuit Court of Appeals in support of its proposition are (Rec. 54),

Coloma v. *Eaves*, 92 U. S. 484.
Dixon v. *Field*, 111 U. S. 82, 93.
German Bank v. *Franklin County*, 128 U. S. 526.
Citizens' Association v. *Perry*, 156 U. S. 692, 701.

Neither of the cases sustains the opinion of the Court.

Coloma v. *Eaves*, as reviewed above, contradicts rather than supports its opinion.

In *Dixon* v. *Field* the bonds were held void, ***although there was a full recital***, because the statute fixed an "express and definite record of a public character," and therefore the County officials had no power to make any decision respecting the performance of the conditions precedent. (See No. III, pp. 21, 22, *supra*.)

In *German Bank* v. *Franklin County*, the bonds ***contained no recitals***, and the certificate of

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the auditor attached to the bonds, as stated by this court, neither "covers or certifies any fact, as to compliance with the conditions prescribed" (128 U. S. 540); and furthermore, the auditor *had no power to decide* any thing relative to the bonds. The decision of the court rests distinctly upon the ground that there was no decision, as to conditions precedent, by any authorized tribunal or officer.

In *Citizens' Association* v. *Perry* there was neither a recital in the bonds of compliance with the Constitution of 1870, *nor* was there *any decision* by an authorized officer that the conditions precedent had been performed.

The cases are inapplicable to support the opinion of the Circuit Court of Appeals. In no case has it been held or intimated that a recital on the face of bonds is essential to give validity to the decision of an authorized officer in respect to the performance of conditions precedent.

If the petitioner on purchasing the $100,000 of bonds inquired and found that the Trustee had decided that the conditions precedent had been performed; that the County Court

expressly concurred in that decision as correct in fact; and that under such circumstances the bonds were then issued, was it not entitled to rely upon such information quite as securely as upon a recital in or an indorsement on the bonds? The indorsement is only evidence of the decision; and evidence of the decision would seem to be sufficient whether by way of indorsement or otherwise.

Looking into the real nature of the thing, there is no reason why a recital or indorsement of the decision should be given any peculiar force. There is the strongest reason why the decision itself should be conclusive. The power and duty to decide as to conditions precedent are vested in the person empowered to put forth negotiable securities, because a conclusive determination of the question of the legal right to issue them is essential to give them negotiability. The tribunal is created, and power to decide finally is conferred in order that purchasers may be able through its decisions to ascertain, certainly and authoritatively, in advance of taking the securities, whether they are rightfully issued.

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How that decision shall be communicated is immaterial, if, as in this case and generally, no specific method of communication is provided by the statute. Certainly in the absence of a statutory direction to that effect a recital of the decision in or its indorsement on the bonds can give to it no increased force or value. Indeed there would seem to be no special propriety in the making of such recital or indorsement. Negotiable bonds are expected and desired to be free from all extraneous matter.

The decision once rendered and communicated to the parties, and the bonds delivered pursuant thereto, the duty of the depository would seem to be at an end.

It was stated above that we should insist that, in fact, there is the **equivalent of a recital** of the Trustee's decision on the face of the bonds.

That contention we base upon the following facts and reasoning:

The bonds when delivered by the Trustee contained a statement that they were issued "*pursuant*" to the enabling Act—a recital

uniformly held by this Court to be equivalent to a declaration that "all conditions precedent have been performed." (See VI, pages 23, 24, *supra.*)

It is true that the bonds being executed by the County alone, through its County Judge and County Clerk, this representation does not in terms purport to proceed from the Trustee. It is also true that any purchaser might have ascertained from the Act that these bonds were required to be placed in the hands of the Trustee before the conditions precedent had been performed.

Standing alone these facts would seem to negative the statement we are now attempting to prove.

But this important fact must not be overlooked: The statute did not require that the bonds should contain any statement or recital of conditions performed or any statement that they were issued pursuant to either the Act or the subscription contract. That recital was purely voluntary.

The Trustee had no right to deliver the bonds until in fact the conditions had been

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performed. When therefore he delivered the bonds in question, with that recital, it was an *adoption by him of the recital* and the equivalent of such recital by himself.

We do not contend that a mere *delivery* by a Trustee of bonds, containing no recitals, is equivalent to a decision. Doubtless the County is entitled to have an actual decision made by the Trustee; and, if he should deliver the bonds without in fact having made a decision or placing on them a declaration which is the equivalent of decision, the County might claim that even a purchaser for value without notice was not an *innocent* purchaser because he should in some way have informed himself whether the Trustee had or had not decided the question *which the law required him to decide* before delivery.

The mere fact of the bonds being on the market perhaps would not conclusively establish that they had been put out by the authority of the Trustee; for perhaps they might have been stolen from him.

What we do maintain is that the putting forth of the bonds by the Trustee with a voluntary recital therein that all conditions prece-

dent have been performed has the same effect as if he had made an indorsement of his decision thereon.

When it is shown further that the Trustee's decision was in fact made in good faith; that it was communicated to the original parties; that it was accepted by them as just and no attempt made to prevent the issue of the bonds, and that they were in fact thus issued by the authority of the officer or tribunal designated by law for the purpose; it is sufficiently established that the bonds are *negotiable* securities against which no defense can be successfully interposed by the maker.

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THIRD POINT.

On the face of the bonds it was represented that they were issued "pursuant" to the enabling statute; before, at and after delivery of the bonds, the County publicly represented and declared that all conditions precedent had been fully performed; it consented to and actively participated with the Trustee in their delivery to the railroad company; it received and still retains, as its own, the capital stock in payment for which the bonds were issued; it voted said stock on sundry occasions and on resolutions vitally affecting the organization and general welfare of said railroad company; for several years it levied a tax for and paid regularly the interest on said bonds; and by its said conduct the County of Mercer is estopped to question the validity of the bonds.

Each of the statements above recited is found by the trial court to be true. The facts so found are conclusive, and we have to inquire only as to their legal effect.

The case, it will be perceived, is not one wherein a bondholder is endeavoring to enforce the payment of bonds fraudulently issued or for which the County has received no substantial consideration. It is rather an attempt by the County to escape, by a pure technicality, from

the obligation of bonds issued with its free consent, for a consideration which itself declared to be a full, complete, compliance with its contract and with the law, and which, confessedly, gives to-day, in substance, all the benefit that might have been derived from the most technical compliance with the statute.

In effect, it is conceded by the Circuit Court of Appeals, and by counsel for the County, that if the County of Mercer has legal power to create an estoppel its action does estop it to make defense to the bonds in question.

The contention is that the County possesses no such power. It is stated, at the close of the opinion of the Circuit Court of Appeals, about as follows:

The County had no power to issue the bonds until the actual completion of the railroad; "that condition having never been complied with, neither the County Court nor the County Judge could by any act of omission or commission waive its performance;" nor could they "validate them by subsequent acts of ratification . . . ratification can only be effective when the party ratifying possesses the power to perform the act ratified." (Rec. 61.)

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In support of this view the court cites,

Marsh v. *Fulton County*, 77 U. S. 676–684.
Norton v. *Shelby Co.*, 118 U. S. 425–451.
Doon Township v. *Cummins*, 142 U. S. 366–376.

This undoubtedly raises a most important legal question.

We frankly concede that the position of the Court, as applied to bonds issued *wholly without authority*, is perfectly sound.

As applied to *negotiable bonds* which the County is authorized to issue, *provided* some condition precedent is performed (said condition being one the performance or non-performance of which rests *in pais*), that position is unsound and is in conflict with the settled rules established by the decisions of this Court.

The true rule we take to be this:

If, on the face of the Act, a county has no power to issue negotiable bonds, or if an established record standard or the decision of an authorized tribunal declares that a condition precedent has not been performed, it conclusively follows that bonds issued are void and neither representations nor ratification will validate them.

But if authority be given to issue negotiable bonds on the performance of conditions precedent, and if *neither* a record standard *nor* a tribunal to decide be established by the Act, it follows, of necessity, that the ascertainment of the fact is *left to the parties interested;* and if they ascertain and agree upon the fact and unite in representing that the conditions have been performed, their action creates an *estoppel* on behalf of a *bona fide* purchaser of such bonds. The County will not thereafter be permitted to question the fact which it has thus *declared to be true, and which the law affords no certain means of showing to be untrue.*

Let us see how far the cases cited by the Circuit Court of Appeals sustain its extreme position.

Afterward we shall invite attention to several decisions which we conceive establish the view for which we contend.

I. Marsh v. Fulton Co., 77 U. S. 676-684.

The facts were that Fulton County, by a vote of its people, authorized a subscription for the bonds of the Mississippi & Wabash Railroad

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Company—having a continuous line of railroad of 230 miles across the entire State.

That corporation was afterward by law dissolved and three new corporations created in its stead. The county officials subscribed for the bonds of one of these, having a line of but 60 miles in length and which this court declares was a "*different corporation* from the original company."

Manifestly there was a clear lack of power to subscribe at all. No question of the performance of conditions precedent was involved.

II. Norton v. Shelby County, 118 U. S. 426.

The bonds here issued were confessedly invalid in their inception. Ratification by the "Board of Commissioners of Shelby County" was relied on as validating the bonds.

It was held that the Board itself, whose act was relied upon, "had no lawful existence; that it was an unauthorized and illegal body . . . that their action in holding a County Court was void."

Clearly this is no authority for what a County Court or a County Judge, lawfully constituted and convened, may or may not do relative to

ratification or any thing else. The case is simply inapplicable to this controversy.

III. Doon Township v. Cummins, 142 U. S. 366.

This case decides that bonds, issued in express violation of the Constitution of the State, in the hands of one who purchased them from the municipality "*with knowledge* that the constitutional limit is thereby exceeded," are void.

The decision proceeds wholly upon two facts, neither of which exists in this case. The Provident Life & Trust Company did not purchase from the County or the Railroad Company, and it had no knowledge or notice of any alleged defect or infirmity in the bonds.

It is manifest that neither of the cases relied on supports the principle announced by the court. They refer to a state of case wholly different, in their facts and in the questions involved, from the case at bar.

It remains to examine the *cases which bear an analogy* to this cause.

IV. Pendleton County v. Amy, 13 Wall. 297, 304-5.

The case, so far as relevant to this contro-

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versy, turned upon the question: whether the third plea by the county (defendant) to an action on its bonds, was good. On demurrer it was *held*, that "the third plea can not be sustained."

The plea, in substance, averred that the legislative authority to issue the bonds in question was coupled with a "*proviso*" that before the bonds should be issued it should be *authorized by a vote* of the people of the county, and that the question had *never* been "submitted to be voted upon by the voters of Pendleton County in conformity with said Acts."

It was held that the plea was insufficient because it did not negative the idea that the bonds contained recitals dealing with that question *nor* show "whether the officers of the county have *levied taxes* to *pay interest* on them or whether any interest has been paid."

Referring to the cases theretofore decided, the court say:

> "It has more than once been decided that a county *may be estopped* against asserting that the conditions attached to a grant of power were not fulfilled The estoppel in these cases was *either* by recitals in the bonds that the conditions prec-

edent had been complied with *or* by the fact that the county had subsequently *levied taxes to pay interest* on the bonds."

It is further said:

"The county *received* in exchange for the bonds a certificate for the *stock* of the railroad company, which it held about seventeen years before the present suit was brought and which it *still holds*. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange and assert against a purchaser of the bonds for value, that, although the legislature empowered it to make them and put them upon the market upon certain conditions, they were issued in disregard of the conditions? *We think that they can not*, and therefore that the third plea can not be sustained."

It will be observed that although the demurrer to the plea admitted that the fundamental condition precedent, viz: a vote authorizing the issue of bonds, was not performed, yet the county might have become *estopped* from raising that question either by levying taxes and paying interest or by receiving and retaining the stock for which the bonds were given in exchange—exactly two things done by the County of Mercer in this case.

V. Supervisors v. Schenck, 5 Wall. 772, 780.

The election required by law, as a condition precedent to an issue of bonds, had been called

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improperly by order of the County Court instead of by the Board of Supervisors. The Board of Supervisors, however, ratified the proceeding afterwards by issuing the bonds. The bonds passed into the hands of *bona fide* holders. The county had for several years paid taxes on the bonds.

Held: That the county was *estopped* to question their validity.

Say the Court:

> "Preliminary proceedings looking to such a subscription by a municipal corporation may often be enjoined for defects or irregularities before the contract is perfected, in case where the corporation will be held to be forever *concluded, if they remain silent* and suffer the shares to be purchased, the bonds to be issued, and the securities to be exchanged. Nothing of the kind was attempted in this case, and the defendants have never rescinded, or attempted to rescind, the contract, *and have never returned, or offered to return, the evidences of their ownership of the shares in the stock of the Company, but have annually acknowledged the validity of the bonds by voting taxes for the payment of the accruing interest*, and have actually paid the same to the extent of six thousand dollars. . . . All of the Acts of the Board of Supervisors of the county in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear *to have been open and well known to the*

corporation, and yet they constantly suffered themselves to be represented in the choice of officers and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, and actually paid the same, as admitted in the special plea. Examined in the light of those suggestions, it would be difficult to imagine a case where the rule that a subsequent *ratification is as good as a previous authority* can be more justly applicable than in the case under consideration."

VI. Ray v. Vansycle, 96 U. S. 675, 687-8.

A defense being made that a subscription to one railroad company had been unlawfully transferred to another, and that the bonds issued under it were therefore void, this Court said:

"There is nothing in the record upon which to base any imputation of collusion or bad faith. The action was taken under such *circumstances of publicity* as to *notify the taxpayers* generally of all that was doing; and we are not prepared to say that the court had not the power to transfer the subscription from the North Missouri Railroad Company to the St. Louis and St. Joseph Railroad Company, and deliver the county bonds to the latter upon its agreement to build substantially the same road for the construction of which the original subscription had been made.

"But *whatever doubt* exists upon this point should be resolved in favor of the *bona fide* holders of the bonds. The taxpayers of the county

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should not, under the peculiar circumstances of this case, be now heard to allege that their agents, invested by statute with the authority and charged with the duty of protecting their interests, had exceeded their powers. . . .

"But this is not all. In payment of the county subscription and bonds, certificates of stock in the St. Louis and St. Joseph Railroad Company were issued to the county, and are *still held* by it. They have never been tendered for cancellation. When the court declared, in 1873, that the county would pay neither the principal nor the interest due on the bonds, no intimation was given of even its willingness to surrender the certificates.

"Upon the clearest principles of justice the taxpayers of Ray County are *concluded* by the acts of their official agents, and by their own *failure*, either intentionally or from neglect, to *assert by appropriate proceedings*, their legal right (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company."

VII. Meyer v. Muscatine City, 1 Wall. 384, 393.

In response to a plea that bonds were void because the question of subscription had *not* been *submitted to a vote* in the form required by law, the Court, passing that question without decision, *held*, that the county was *estopped* to raise it. It was said:

> "The record shows that all the votes cast except five were in favor of the loan. The city and citizens adopted and acted upon the ordinance as valid and sufficient. The citizens voted, and the city authorities issued the bonds. *No one interposed to prevent their issue.* It is not questioned that all the parties acted in good faith, and the *city can not now be heard* to object to the regularity of its own proceedings. A party taking the bonds was bound to look to the legal authority under which the public agents acted. If that were sufficiently comprehensive, he had a right to presume that those empowered to act and acting under it had complied with its requirements."

We submit that the decisions of this Court clearly contravene the position of the Circuit Court of Appeals and establish that a county may by estoppel lose a defense otherwise perfectly good and based upon the invalidity of its bonds.

There is one circumstance which peculiarly demands that the estoppel should be here applied.

The Subscription Contract (not the Act) required that, in order to entitle the railroad company to receive the bonds, the road should be "so completed by the county," etc., *within five years* from the subscription.

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When the road had been completed to Burgin on the Cincinnati Southern Railroad the question came up for discussion whether that was a compliance with the statute. Some doubt being expressed, the Louisville Southern Railroad Company at once prepared to extend the road to the Boyle County line.

The County Court, by an order entered on its records, expressed to the trustee the "opinion that such delivery (of the bonds) should be made, and the construction of the railroad not forced to the Boyle County line." The entire county concurred manifestly in this opinion, as during more than a month after the time no effort was made by the county or any citizen to prevent it. At the request of the County Court, therefore, the road was stopped at Burgin.

At any time, thereafter, for three and one-half years, the road might have been completed to the county line and a right to the bonds conclusively established.

By the delivery of the bonds and by continuous payment of interest, the railroad company was induced to withhold the extension.

As soon as the five years elapsed the county refused to pay further interest, and made the point that the bonds had been illegally delivered.

To permit that defense, under the circumstances, would be to countenance a distinct and apparently intentional fraud by the county.

But this court has declared more than once that a *county*, "quite as much as an individual, is *held to a careful adherence to the truth* in their dealings with other parties, and can not by their representations, or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced."

Bissell v. *Jeffersonville*, 24 How. 287, 300.
Zabriskie v. *Cleveland, etc., R. R.*, 23 How. 400.

In *Moran* v. *Commissioners of Miami County*, 2 Black, 916, the views of this Court are thus expressed:

> "The object of this court has been in cases of a like kind, and it is still its purpose to give to the contracts of counties, for the purchase of railroad stock and borrowing money to aid in the construction of railroads and other internal improvements, a strict interpretation of the legisla-

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> tive acts empowering them to do one o. the other; but at the same time to *give protection* to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against their efforts to be relieved from their responsibilities of official acts in putting such papers into circulation, for c' italists to invest money in them, *on assurances that the principal and interest would be paid accordingly.*"

The foregoing argument proceeds upon a tacit concession that the decision of the Trustee is contrary to the truth, and that the Louisville Southern Railroad was not in fact completed through the County of Mercer within the meaning and intent of the statute. We shall now endeavor to show:

FOURTH POINT.

That before delivery of the bonds sued upon, the Louisville Southern Railroad was, in fact, completed through the County of Mercer within the meaning and intent of the statute; that even if this be not true, within the strict technical definition of the words used, yet the statute is capable of a construction whereby the building of the road through Harrodsburg to Burgin, on the Cincinnati Southern Railroad, was a substantial compliance with the condition precedent as to completion through the county; that it was in good faith so construed by the county, by the Railroad Company and the Trustee, before, at and after the delivery of the bonds, and that such contemporaneous construction adopted and acted on by all parties in interest should now be adopted by the court.

His Honor, Judge Barr, declined to find as a fact whether or not the road had been "completed through the County"—deeming it unnecessary in view of his conclusion that the decision of the trustee was conclusive.

He did, however, find all the facts necessary to determine the question. The only thing remaining to make his decision complete is to define the word "through," as used in the Act. That being purely a question of construction, this court may rightfully deal with it.

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The Circuit Court of Appeals construed the Act as requiring a completion of the railway through the county "from one side or line to the opposite *or another* side or line." (Rec. 49).

An Act, like a contract, is to be construed in the light of its general purposes, and each part of the Act in view of its context.

The word "through" is frequently used to signify something other than "from one side to the opposite." If one should say "I rode through the Park;" or "I walked through the City;" or if an engineer should report a line of road as built "through the mountains" no one would assume that the word was used necessarily to express passage from one side to the opposite. The dictionaries give numerous meanings to the word "through."

The situation of the county, the known wishes of its people, the objects and purposes to be attained indicate that there was no purpose to confine the meaning of the word "through" to so narrow a significance. No point is mentioned on either line of the county to or near which the railroad shall extend. Indeed, there is not a town nor any point on either line of

the county to which there would be the slightest propriety in specially extending a railroad —unless for the purpose of forcing its extension southwardly or eastwardly beyond the limits of Mercer County. But there is nothing in the authorizing Act nor in the charter of the Railroad Company which requires an extension of the line beyond Mercer County.

Assuming that the road was not compelled to pass beyond the boundaries of Mercer County, the soundest reasons exist to believe that it was the legislative intent that the road should be permitted to terminate just where it did—on the Cincinnati Southern Railroad near the south line of the county.

If extended to the east county line, the road would end in the middle of Dix River, and the short branch east of the Cincinnati Southern would be worthless. If extended to the Boyle County line (unless to the point crossed by the Cincinnati Southern) that part of the road beyond Harrodsburg would be similarly worthless. To have connected with the Cincinnati Southern on the Boyle line would have afforded no advantage to the County of Mercer greater

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than or different from the connection at Burgin.

On the other hand, an extension of the road to any other point on the south or Boyle County line would inevitably have forced its completion to Danville—the active rival of Harrodsburg—a thing to which the interests, the prejudices, and the passions of the Mercer County people were actively hostile.

No sound business reason can be suggested; no reason is suggested by the Circuit Court of Appeals for its very narrow construction of the word "through" except that it is the *ipse dixit* of the legislature. ***But that is the very question at issue.***

The object of the Act was to invite and to secure a road through the county—entering anywhere, extending in any direction, except that it should reach the county seat. Communication with Louisville, the initial terminus of the road, was its object. Beyond this there was no specific purpose as to the location or length of the road through the county.

There was, however, one object to be carefully guarded and attained, viz: that the county

should not put out its bonds for the construction of a railroad that was not and might *never be completed.* The language is peculiar: that before the bonds shall be delivered, the road shall have been "so completed through the county that a train of cars shall have passed over same." Manifestly the emphasis is upon the completion of the road; completion demonstrated by the actual passage of cars. To insure completion of the road, at least to or through (not necessarily beyond) Harrodsburg was the purpose of the Act, and that purpose was substantially fulfilled by the construction of the road through Harrodsburg to the Cincinnati Southern at Burgin.

An illustration of the fallacy of the reasoning of the Circuit Court of Appeals lies in its concession that the words "completed through the county" might have been fulfilled by a completion of road from the north line to "another," viz: the eastern or adjacent line rather than to the "opposite" line.

Such a construction of the Act, while consistent with the dictionary definitions, shows how various may be the meanings of the word

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"through." It would accept as a performance of the condition precedent a mere passage across one corner of the county—perhaps not giving one third or one tenth either of the actual distance or of the business facilities afforded by the road as built.

On the other hand, if the road, instead of coming by the Lawrenceburg route, had been constructed via Springfield, and, entering the county on the south line near its western line, and extending thence in a direction measurably parallel with the south line, had, near the extreme eastern border of the county, recrossed the southern line and passed on to Eastern Kentucky, the condition would not have been performed and the bonds could not lawfully have been delivered.

We submit that the Act is not subject to such frivolous objections; that the condition precedent respecting the completion of the road was substantially performed, and that the trustee's decision is intrinsically sound.

But if this reasoning be not accepted as absolutely correct, we submit that the *contempora-*

neous construction of the Act by the parties concludes the question.

The fact that the Act was construed by all parties, including the county officials and the citizens of the county, in the manner suggested above, does not admit of controversy.

The facts found by the trial court: that this particular question was "publicly and generally discussed" (Rec. 27); that the County Court, consisting of the County Judge and all the magistrates, was convened for the purpose of considering it; that as early as June 26, 1888 (more than a month before delivery of the bonds), the County Court entered on its records a declaration that its members "are of opinion that such delivery should be made and the construction of the railroad not forced to the Boyle County line" (Rec. 28); that although Pearson, Trustee, afterwards expressly notified the County Judge and the County Court of his purpose to deliver the bonds unless objection were made, that no objection was made by either the County Judge, the County Court or any citizen of the county (Rec. 9); that the Louisville Southern Railroad Company had actually pre-

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pared to extend its road to the Boyle line, having acquired the rights of way for practically the whole distance and was induced to renounce its purpose by the opposition thereto of the county itself (Rec. 27); that the Trustee delivered the bonds, though liable on his bond for a wrongful delivery; that the county received the stock of the Railway Company for which it had subscribed, and was present by its County Judge and participated in the delivery of the bonds (Rec. 28, 29): and that for three and a half years the County paid the interest on the bonds; these facts, we submit, place beyond dispute that all parties construed the Act to require nothing beyond what, in fact, was done, in order fully to perform the conditions precedent.

That such construction was adopted in good faith is equally clear. It was adopted after full public discussion and careful consideration: at a time when the Louisville Southern Railroad Company was able and willing to extend its road to the Boyle line; and to hold that it was not in good faith implies duplicity in the county officials amounting to perfidy—of which

no intimation is contained in the special findings of fact by the court. If such fraudulent purpose really existed, it would form a conclusive ground of estoppel.

We shall rely upon the previous argument to establish that the Act is possibly *open to the construction* thus placed upon it; that a contrary intent is not so clearly expressed but that men of reasonable intelligence and of honest purpose might adopt it; and upon that assumption, proceed to inquire, to what effect is such contemporaneous construction entitled?

In *Lawson on Contracts* (Sec. 389, Subsec. 7) it is said that the "courts will consider, where the intent is doubtful, the manner in which the contract has been executed by both or one of the parties with the express or implied assent of the other," citing numerous authorities.

In *Beach on Contracts* (Secs. 721-722) it is said:

> "Where the language of a contract is *susceptible of two meanings*, the Court will infer the intention of the parties, and their relative rights and obligations, from the circumstances attending the transaction."
>
> . . . . . .

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> "If the words or terms are equivocal, resort may be had to the circumstances under which the contract was executed and to the *contemporaneous construction given to the contract by the parties*, as evidenced by possession or similar acts. The subsequent acts are admitted to show *how the parties understood their contract*, and are a *practical construction of it*."

In a note to Sec. 722 he says:

> "The practical construction put upon a contract by the parties to it is sometimes *almost conclusive* as to its meaning."

If this controversy existed between individuals, *sui juris*, there can be no doubt that their contemporaneous construction of their contract, so clearly expressed, so persistently acted on, would be accepted by a court as conclusive of its true meaning.

If a contract be capable of two constructions, the court will adopt that construction which the parties themselves gave to it during performance, if in fact they agreed upon a given construction. Especially will this be done in favor of one who has been induced by the other party to adopt a particular construction; upon the faith of it to expend large sums of money for the benefit of the other party; and when

the last named party has received and still holds the consideration which the other was thus induced to surrender upon the faith of such agreed construction of the contract.

The rule is demanded by justice and fair dealing. The party required to perform may be quite willing and able to perform according to either construction of the contract—as in fact the Railway Company was in this instance. To permit the other to mislead him in the construction of a doubtful clause and then to defend himself by reason of it, would be to sanction the gravest injustice and fraud.

But it may be contended that such a rule is confined to individuals and can have no application to a statute nor to a municipal corporation.

But this court, recognizing that a private Act which is made the basis of a contract is subject to the same rules of construction, has distinctly held otherwise.

In *Mercer Co.* v. *Hackett*, 1 Wallace, 83, 94, where, by statute, a condition precedent to a county subscription to railroad stock was, that it should previously have been "designated,

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advised, and recommended by the grand jury," the defense was offered that the subscription had only been so "recommended."

The Supreme Court say:

> "It would require no great latitude of construction to treat this, as the commissioners might justly do, as a substantial compliance with the Act. But it would be *contrary to good faith and common justice* to permit them to allege *a newly discovered construction of an equivocal power* after they have sold the bonds and they have passed (as is admitted in this case) into the hands of *bona fide* purchasers for value."

In *City of Chicago* v. *Sheldon*, 9 Wallace, 54, wherein the controversy turned upon the *construction of an ordinance* of the city of Chicago, the Supreme Court say:

> "What adds great weight to this view is, it *accords with the practical construction* given to the contract by both parties. . . . In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the *practical interpretation* by the parties themselves is entitled to *great if not controlling influence*. . . . But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

In *Van Hostrup v. Madison City*, 1 Wall. 291, 297, this court in construing a city charter say:

> "Even if the case had been doubtful, inasmuch as the *city authorities have given this construction* to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, *we should have felt bound to acquiesce in it.*"

To the same effect see

City of Savannah v. *Kelly*, 108 U. S. 184, 191.
Topliff v. *Topliff*, 122 U. S. 121, 131.
United States v. *Alabama R. R. Co.*, 142 U. S. 615, 621.

If the foregoing reasoning be sound, it follows that the conditions precedent respecting completion of the road were fully performed and that the *decision of the Trustee* strictly *conforms to the truth* as established by the evidence: The bonds were fairly earned and the judgment of the trial court should be affirmed.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Counsel for The Provident Life and Trust Company of Philadelphia.

LOUISVILLE, KY., JANUARY 1, 1898.

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No. 243.

Reply Brf. of Dickson v Bullitt for D. E.

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JAMES H. McKENN
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

Filed April 20, 1898.

The County of Mercer, in the State of Kentucky, Plaintiff in Error,

vs.

The Provident Life and Trust Company, Defendant in Error.

October Term, 1897.

No. 243.

REPLY TO BRIEF FOR PLAINTIFF IN ERROR.

In the original brief for the defendant in error, the argument is based almost exclusively upon a discussion of the decisions of this court relating to municipal bonds; but in that for the plaintiff in error, pages 26–7, citations are made as to the effect of the delivery of a deed lodged in escrow, before the performance of the condition. Conceding that the contention of Vaughan, Sergeant, in Derby Canal Company *vs.* Wilmot, 9 East., 360, upon the authority of the case of the Dean and Chapter of Fernes, Dav. Rep., 44 *b*, 2 Rol. Abr., 23, l. 50—that "a deed of a corporation needs no delivery, but the affixing of the common seal gives it perfection without delivery"—would not now be accepted as sound, yet the well-established qualifications of the general rules quoted from Devlin on Deeds are sufficient to render them inapplicable to the present case. The subject is discussed very satisfactorily by Mr. Jones in his recent work on the Law of Real Property in Conveyancing, and his conclusions are thus stated:—

"The better opinion, however, upon principle, and that supported by the weight of authority, is that a subsequent purchaser in good faith acquires a good title, though his grantor had received his deed from a depositary without performing the condition upon which such deed was

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to be delivered. The depositary of the deed is the agent of the grantor as well as of the grantee. (Bailey *vs.* Crim, 9 Biss., 95; Blight *vs.* Schenck, 10 Pa. St., 285, 51 Am. Dec., 478; Somes *vs.* Brewer, 2 Pick., 183, applicable in principle; Quick *vs.* Milligan, 108 Ind., 419, 9 N. E. Rep., 392; Simpson *vs.* Bank, 43 Hun., 156, affirmed 120 N. Y., 623; Simpson *vs.* Del Hoyo, 94 N. Y., 189; Hubbard *vs.* Greeley, 84 Me., 340, 24 Atl. Rep., 799.) 'If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to that. But this principle must not be extended to a person who has no possible means of protecting himself; who acts on the presumption that the records of the county are not intended to mislead, but speak the truth; that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper covenants.' (Blight *vs.* Schenck, 10 Pa. St., 285, 293; 51 Am. Dec., 478, per Rogers, J.) To like effect, in a Massachusetts case, Chief Justice Parker said: 'It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint.' (Somes *vs.* Brewer, 2 Pick., 184, 202; 13 Am. Dec., 406.) This subject is also considered in a well-reasoned and conclusive opinion by Judge Walton in a recent case in Maine. He says: 'Escrows are deceptive instruments. They are not what they purport to be. They purport to be instruments which have been delivered, when, in fact, they have not been delivered. They clothe the grantees with apparent titles which are not titles. Such deeds are capable of being used to enable the grantees to obtain credit which otherwise they could not obtain. They are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used. And when the maker of such an instrument has voluntarily parted with the possession of it, and delivered it into the care and keeping of a person of his own selection, it seems to us that he ought to be responsible for the use that may in fact be made of it, and that in no other way can the public be protected against the intolerable evil of having our public records incumbered with such false and deceptive instruments.' (Hubbard *vs.* Greeley, 84 Me., 340; 24 Atl. Rep., 799.)" Vol. II., section 1316.

"Another and conclusive consideration why the title of a *bona fide* purchaser for value should not be disturbed, by reason that any former owner has obtained possession of his deed wrongfully or fraudulently, is that all titles would thereby be rendered insecure. As declared in the Pennsylvania case above cited, 'if a title may be avoided under such circumstances, no purchaser is safe;' or, as said by Judge Walton in the recent decision in Maine, 'all titles would be as unstable as sand upon the seashore.' In the Massachusetts case, Chief Justice Parker on this point said: 'This admission is certainly correct, for there could be no security of title if a purchaser from one actually seized and possessed, with an apparently lawful title existing on the public records, he having no knowledge of a concealed defect in the title of his grantor, should be liable to be defeated of his title by proof of fraudulent acts of his immediate or remote grantor, of the existence of which he had not even a suspicion; and if the principle on which the argument is founded is true, the purchaser would, at least for forty years, hold an estate defeasible by the oral proof of facts to which he was neither a party nor privy, transacted by some anterior parties to the title, perhaps after twenty years or more conveyances, all appearing unimpeachable on the records.' (Somes *vs.* Brewer, 2 Pick., 184, 190; 13 Am. Dec., 406. See to like effect Miller *vs.* Fletcher, 27 Gratt., 403, 414, per Staples, J.; Quick *vs.* Milligan, 108 Ind, 419, 9 N. E. Rep., 392, per Elliott, C. J.)" Section 1317.

"In Fletcher *vs.* Peck, 6 Cranch, 87, 133, the opinion of the court being by Chief Justice Marshall, he said: 'If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties. But the rights of third persons, who are purchasers without notice and for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who held the property before he acquired it, of which he had no notice, such concealed defect cannot be set up against him. He has paid his money for a title good at law, and he is innocent, whatever may be the guilt of others; and equity will not subject him to the penalties of other's guilt. All titles would be insecure, and the intercourse between man and man very seriously obstructed, if this principle were overturned.'

"The grantor is estopped from questioning the title of a purchaser in good faith from a grantee who has fraudulently obtained possession of the deed from the depositary. Whenever the title reaches the hands of such a purchaser for value the rights and equities of the defendant owner are cut off. The grantor has by his own act placed the *indicia* of title in the grantee, and, though the latter has fraudulently obtained possession of the deed, the grantor who by his act has invested the grantee with the apparent title should suffer the loss rather than the innocent purchaser who has, trusting in this apparent title, paid value for the property.

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(Simson *vs.* Bank, 43 Hun., 156, affirmed 120 N. Y., 623; Simpson *vs.* Del Hoyo, 94 N. Y., 189; Quick *vs.* Milligan, 108 Ind., 419, 9 N. E. Rep., 392.)

"Of course a subsequent purchaser with notice from one to whom the deed held in escrow has been delivered, without authority, has no greater rights than the grantee. (Illinois Cent. R. Co. *vs.* McCullough, 59 Ill., 166; Abbott *vs.* Alsdorf, 19 Mich., 157; Lewis *vs.* Prather (Ky.), 21 S. W. Rep., 538.)" Section 1318.

The final sentence—*a subsequent purchaser with notice has no greater rights than the grantee*—suggests the real question in this case. Two of the authorities cited by the author were cases of actual notice, in fact, and in the other the first vendor was still in possession, so that they present no difficulty in principle; but in this case, it is conceded that the purchaser had no actual notice. The plaintiff in error is obliged to maintain, therefore, that the statement upon the face of the bonds, that they were originally delivered in escrow, puts the purchaser upon inquiry, and affects him with constructive notice of all that inquiry would have developed. In support of this assertion no authority is adduced, and it is submitted that, considering the nature of the securities involved, such could not have been the intention of the legislature. Without repeating what has been already urged in the original brief and supplemental note as to the futility of inquiry, which must have proved unavailing, and as to the effect to be given to the fact that the legislature had made the bonds in terms negotiable, and thereby excluded the duty of inquiry, a brief reference to some of the more important authorities, upon the subject of the constructive notice, which will affect a *bona fide* purchaser for value, may be useful.

In Jones *vs.* Smith, 1 Hare, 55, V. C. Wigram said that—

"The cases in which constructive notice has been established resolve themselves into two classes: First, in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected; and secondly, cases in which the court has been satisfied, from the evidence, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.

"The proposition of law upon which the former class of cases proceeds is not that the party charged had notice of a fact or instrument which, in truth, related to the subject in dispute without his knowing that

such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is not that the party charged had incautiously neglected to make such inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding knowledge—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind—if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser without notice."

Lord St. Leonards defines it as follows:—

"Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted; but courts of equity will not extend the doctrine to cases to which it has not hitherto been held applicable. The question upon constructive notice is not whether the purchaser had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

2 Sugden, V. & P., 755.

In Ware *vs.* Lord Egmont, 4 DeG., M. & G., 473, Lord Cranworth expressed his entire concurrence in what on many occasions of late years had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine—to attempt to apply it to cases to which it had not hitherto been held applicable. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross

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or culpable negligence. It was obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, could possibly be laid down. And in Attorney-General *vs.* Stephens, 6 DeG., M. & G., 148, he observed that he believed that the length to which the doctrine of constructive notice had been extended had often been productive of very considerable inconvenience and had injuriously impeded the free transfer of real property. And in Montefiore *vs.* Browne, 7 H. L. C., 241, 269, Lord Chelmsford said he agreed with the cases cited, that constructive notice cannot be imputed to a party unless his ignorance amounts to gross or culpable ignorance. Lord St. Leonards, in the last (fourteenth) edition of his work on "Vendors and Purchasers," cites these cases with approval, and gives the terms of an Act which he introduced into the House of Lords to limit the operation of implied notice against an innocent purchaser. It would seem to have been little more than declaratory of the doctrine as above stated.

In England, where the equitable lien of the vendor prevails against the purchaser and all claiming under him with notice, though for a valuable consideration (2 Sugden, V. & P., 680), it does not prevail against a *bona fide* purchaser without notice, and the mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him, for that does not show it was not paid for. (1 Bro. C. C., 302.)

Where the seller, who had not been paid all the purchase money, although he had acknowledged the receipt of it in the body of the deed and by indorsement, was in possession of the estate as lessee to the equitable tenant for life, under the settlement for the uses of which the estate was purchased, annuitants under the equitable tenant for life were held not to be bound by the vendor's lien, in consequence of their attorney having had notice that the seller was in possession of the estate; for as the seller had declared by the conveyance that he had received all the money, no man could be expected to inquire whether the purchase money had been paid.

White *vs.* Wakefield, 7 Sim., 401.

The omission to require strict legal evidence of title before advancing money is not necessarily such negligence as would be attended with the same consequences as actual notice.

"The affairs of life could not go on without reasonable confidence, * * * and I think that, although both parties are innocent, one is, generally speaking, not sorry to see that the loss has fallen on that innocent party who employed and authorized the fraudulent person and thereby was remotely the cause of the fraud being committed." Per Campbell, L. C. Perry *vs.* Holl, 2 DeG. & J., 38.

In view of these statements of the limitations of the rule as to the duty of making inquiry in the purchase of real estate, it is submitted that it would be most unreasonable to hold that the purchaser of a bond made negotiable by statute, in order to facilitate its sale, should be required to ascertain, at his peril, whether the condition had been satisfied. Even if the obligor had been defrauded, and the delivery altogether fraudulent, it would have been the result of the obligor's own act in selecting an unfaithful depositary, and the rule enunciated by Mr. Justice Buller, in Lickbarrow *vs.* Mason, 2 Term Rep., 63, 70 (1 Smith's Leading Cases, eighth edition, star page 763), "We may lay it down as a broad, general principle that *wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it*," has been repeated by every judge from that day to this when such a condition of affairs has presented itself.

SAMUEL DICKSON,
THOMAS W. BULLITT,
For The Provident Life and Trust Company.

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IN THE

Supreme Court of the United States.

The County of Mercer, in the State of Kentucky, Plaintiff in Error,

vs.

The Provident Life and Trust Company, Defendant in Error.

REPLY TO BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL DICKSON,
THOMAS W. SULLITT,
For the Provident Life and Trust Company.

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PROVIDENT LIFE & TRUST COMPANY *v.* MERCER COUNTY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Argued April 29, May 2, 1898. — Decided May 23, 1898.

The transactions with the county of Mercer, which resulted in the delivery of the bonds of the county to the railroad company, were had in the utmost good faith.

Barnum v. *Okolona*, 148 U. S. 393, reaffirmed to the point "that municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act." But when the good faith of all the parties is unquestionable, the courts will lean to that construction of the statute, which will uphold the transaction as consummated.

The provision in the act authorizing the issue of Mercer County bonds to the Louisville Southern Railroad Company, when its railway should have been so completed "through such county that a train of cars shall have passed over the same, was fully complied with when the railroad was so completed, from the northern line of the county to Harrodsburg, that a train of cars passed over it; but, even if this construction be incorrect, it must be held that when the trustee, in whose hands the county bonds were placed in escrow, adjudged that the condition prescribed for their delivery had been complied with, and delivered the bonds to the railroad company, the company took such a title as, when the bond was transferred to a *bona fide* holder, would enable him to recover against the county, even if the condition had in fact not been performed.

On May 15, 1886, the general assembly of the Commonwealth of Kentucky passed an act, c. 1159, Private Acts,

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entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," the first section of which is as follows:

"SEC. 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may pay therefor, in the negotiable coupon bonds of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein."

The second and third sections contain provisions in detail in respect to a vote of the people of the county, the subscription to the stock of the company and the execution of the bonds. The fourth section reads:

"SEC. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

In pursuance of this act an election was held in the county, resulting in favor of making the subscription and issuing the bonds. The subscription was made and the bonds executed. The bonds were, omitting a provision for repayment, in the following form:

Statement of the Case.

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A.D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10, A.D. 1887.

* * * * *

"In witness whereof, the County of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county, with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A.D. 1887.

"THE COUNTY OF MERCER, [SEAL.]

"BY JOHN W. HUGHES, *County Judge.*

"Attest: BEN. C. ALLIN, *Clerk.*"

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Statement of the Case.

On February 7, 1887, the county court appointed D. L. Moore trustee, as prescribed by section 4 of the act. Moore accepted the trust and gave bond with good surety, as required, and on March 3, 1887, the bonds were deposited with him.

Prior to June 1, 1888, the railroad was completed from Louisville, in Jefferson County, via Shelbyville, in Shelby County, and Lawrenceburg, in Anderson County, south through Mercer County to the depot of the Southwestern Railroad in Harrodsburg, the county seat; there it connected with a short line of road constructed by the Southwestern Railroad Company, and extending from Harrodsburg to Burgin, on the Cincinnati Southern Railroad; the Southern Company owned all the stock of the Southwestern Company, had possession of its road, and subsequently the two companies were consolidated and the latter merged in the former company. On said first day of June, 1888, a train of cars, moved by an engine, passed over the road from Louisville through Harrodsburg to Burgin and then returned to Louisville, and from that time the railroad from Louisville to Burgin has been continually operated as the Louisville Southern Railroad. The distance from the northern line of Mercer County to Harrodsburg is fifteen miles, from Harrodsburg to Burgin, 4.72 miles. Burgin is three miles from the south line of Mercer County and 4.74 miles from the east line. The nearest point that the road runs to the south line of Mercer County is two miles.

On July 3, 1888, Moore resigned his position as trustee, and Isaac Pearson was appointed in his place. He gave security to the county, as required by the act, and received from the prior trustee all the bonds and coupons in his hands. About the first of June, 1888, the time of the passage of a train of cars from Louisville to Burgin and back, as hereinbefore stated, there arose a question whether the condition precedent to the delivery of the bonds had been complied with by the railroad company, and it was in view of this difference of opinion and the doubts of the trustee Moore that he resigned his position. This question was publicly and generally discussed, and while the discussion was going on, and before Pearson, the trustee, had determined that the condition precedent had been per-

formed and that he would deliver the bonds, the railroad company prepared to extend its road toward and to the town of Danville, in Boyle County, which was 7.47 miles distant from Harrodsburg, and with one exception acquired all the rights of way to the southern line of Mercer County. A movement was made in the county to have the court of claims of the county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of peace of his county, met on June 26, 1888, and the question was fully discussed before them. After argument they declined to instruct the trustee as to his action, but, upon motion of one of the justices, passed and spread upon the records this resolution:

"At a county court of claims for Mercer County, at the court house in Harrodsburg, on Tuesday, the 26th day of June, 1888.

"Present: John W. Hughes, J., P. M. C. C., and M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, E. I. Massie, N. Harris, G. J. Johnson, B. O. Jones, A. Johnson, J. C. McIntire and John T. Pankey, justices of the peace of Mercer County.

"G. J. Johnson, as justice of the peace of this county, offered into the court the following motion, which is ordered to be noted of record, and is as follows:

"'The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle County line.'

"And said motion being seconded, the ayes and nays were taken, and resulted as follows:

"Ayes, 12, as follows: M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, N. Harris, G. J. Johnson, B. O. Jones, J. C. McIntire and John T. Pankey.

"Nays, none; not voting, two, as follows: W. I. Massie and A. Johnson."

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Counsel for the Provident Life and Trust Company.

After this, Pearson, the trustee, decided that the conditions had been performed, and on the — day of August, 1888, in the presence of the county judge of the county, delivered the bonds, first cutting off and burning the past due coupons. At the same time the Louisville Southern Railroad Company delivered to the county its certificate for an equal amount of its capital stock. The stock was accepted by the county and voted by the county judge at a stockholders' meeting on at least two occasions, one on December 18, 1888, and another on May 26, 1890, and the stock certificate is still held by the county of Mercer and has never been tendered to the railroad company, or any one representing it. At these two meetings Mercer County voted its shares in support of certain resolutions materially affecting the business affairs of the railroad company and also accepting a legislative amendment to its charter, as well as in the election of directors. The county regularly levied an annual tax to meet the semi-annual interest on the bonds, and paid such interest for the years 1889, 1890, 1891 and January 1, 1892. Since then it has paid no interest. The Provident Life and Trust Company is a *bona fide* purchaser of $100,000 of the bonds, and on default in payment of the coupons it commenced this action on November 3, 1892, in the Circuit Court of the United States for the District of Kentucky. The pleadings having been perfected, the case was tried before the court without a jury. Special findings of facts were made, and upon them judgment was on April 30, 1895, rendered in favor of the plaintiff. From this judgment the county took the case on error to the Court of Appeals for that circuit. That court, on March 3, 1896, filed an opinion holding the bonds void, 43 U. S. App. 21, and entered a judgment reversing the judgment of the Circuit Court and remanding the case with instructions to enter a judgment in accordance with the opinion. Thereupon, on October 20, 1896, the case was brought to this court on certiorari.

Mr. Thomas W. Bullitt and *Mr. Samuel Dickson* for the Provident Life and Trust Company.

Mr. John B. Thompson and *Mr. Alexander Pope Humphrey* for Mercer County. *Mr. George M. Davie* was on their brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

No one can read the facts above stated, as found by the Circuit Court, without being impressed that the transactions between the county and the company, culminating in the delivery of the bonds to the latter, were had in the utmost good faith. There was no misrepresentation, concealment or fraud. The work done by the company in constructing the railroad was obvious and satisfactory. The question whether that work was a compliance with the terms of the subscription was publicly discussed, was fully considered at a meeting of the county court of claims, whose opinion was, and was so expressed, that the contract had been fully complied with, and that the bonds ought to be delivered. Prior to the time that such conclusion was reached the company, in view of the question, commenced its preparations to construct the road to the south county line, and had obtained, with a single exception, the necessary right of way therefor. When advised by the opinion of the court of claims that the construction of the additional two miles of road was unnecessary, and the judgment of the trustee was announced that he considered the contract of subscription fully complied with, the company desisted and took the bonds. The county accepted the stock issued by the company, voted upon it at stockholders' meetings, and has ever since retained it. For three years and a half it paid the interest on the bonds, without questioning their validity. So that if good faith on the part of all concerned was the sole condition of the validity of these bonds, no question could be made concerning it.

We do not mean to imply that good faith is the only requisite, or that a condition plainly prescribed by the legislature can be ignored by a county, even with the best of intentions. On the contrary, we reaffirm the proposition laid down in *Barnum* v. *Okolona*, 148 U. S. 393, 395:

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"That municipal corporations have no power to issue bonds in aid of a railroad except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. *Sheboygan County* v. *Parker*, 3 Wall. 93, 96; *Wells* v. *Supervisors*, 102 U. S. 625; *Claiborne County* v. *Brooks*, 111 U. S. 400; *Young* v. *Clarendon Township*, 132 U. S. 340, 346."

At the same time when the good faith of all the parties is unquestionable the courts will lean to that construction of the statute which will uphold the transaction as consummated. Especially will that be so in a case in which the question of construction having been raised the one party commences preparations to perform work which will put the matter beyond question and desists therefrom only upon the representations of the other party that it is satisfied the work has been completed according to the terms of the contract. As said in *Andes* v. *Ely*, 158 U. S. 312, 321:

"While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity."

See also *Mercer County* v. *Hacket*, 1 Wall. 83; *Van Hostrup* v. *Madison City*, 1 Wall. 291; *Ray County* v. *Vansycle*, 96 U. S. 675.

With these preliminary observations, we pass to a consideration of the questions presented; and in the first place it must be noticed that no matter of constitutional limitation is involved. The only inquiry is whether the conditions prescribed in the statute have been fully complied with, and, if not, whether the county is in a position to avail itself of the non-compliance. The statute in terms authorizes the issue of negotiable bonds. The bonds are negotiable, and issued by the proper county officers; carry on their face recitals that they have "been issued pursuant to the authority conferred" by an act of the legislature, which is named, and "pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock" of the railroad company. By a long series of decisions such recitals are held conclusive in favor of a *bona fide* holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will in favor of a *bona fide* holder be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to these in the bonds before us. See among other cases *Coloma* v. *Eaves*, 92 U. S. 484; *Warren County* v. *Marcy*, 97 U. S. 96; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Bernards Township* v. *Morrison*, 133 U. S. 523; *Citizens' Savings Ass'n* v. *Perry County*, 156 U. S. 692; *Andes* v. *Ely*, 158 U. S. 312.

But it is said that the recitals in this case can be held conclusive only as to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election,

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etc., because by section 4 of the statute the bonds, when executed, were to be deposited with a trustee, to be held in escrow and delivered only upon the performance of a certain condition — a condition to be performed subsequently to the execution of the bonds. Assuming, without deciding, that such limitation must be placed upon the recitals, we pass to inquire whether that condition was in fact performed, and if not, whether after delivery by the trustee the county can be permitted to raise the question as against *bona fide* holders. That condition is that the bonds shall not be binding "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." It is contended that the word "through" means clear through the county from one end to the other; and that while the railway enters on the north line of the county, and runs within the county limits a distance of nearly twenty miles, it does not touch the south county line, nor come within a nearer distance of it than two miles. So it is said the railway does not run through the county, and therefore the condition upon which the bonds could become binding and valid obligations did not and does not exist. It is true the primary meaning of the word "through" is from end to end, or from side to side, but it is used in a narrower and different sense. Its meaning is often qualified by the context. Thus, if one should say that he had spent the summer travelling through New England it would not be understood as carrying an affirmation that he had been from one side clear to the other or from one end clear to the other, but that his travels had been within the limits of New England. That book which is said to have had a wider circulation than any except the Bible, Bunyan's Pilgrim's Progress, opens with this sentence: "As I walked through the wilderness of this world, I lighted on a certain place where there was a den, and laid me down in that place to sleep." Does the writer mean that he passed from one end of the wilderness to the other, and at the further end found the den, or simply that as he travelled in the wilderness he lighted on the den? Obviously the latter. Many similar illustrations might

be cited. They show that "through" does not always mean from end to end, or from side to side, but frequently means simply "within." Now, the language here is "so completed through such county that a train of cars shall have passed over the same." Obviously, the primary thought is not the extent of the line, but the extent to which the work shall be completed. In other words, the principal thing is not that a railroad shall be partially completed from one end of the county to the other, but that a railroad shall be so completed within and substantially through the county that a train of cars passes over it. It may well be believed that, inasmuch as the company's road was to commence at Louisville, on the northern border of the State, and its principal city, the purpose was to connect the county with that city, and that the road should be so fully completed as to permit the moving of trains over it, *i.e.*, be in a condition for actual use, and not that a road, no matter how far constructed, should be extended from one end of the county to the other. This view of the intent of the legislature is sustained by the last clause of the section, which provides "that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." This contemplates that the line coming from the north shall enter the county and pass through it so far as to reach the corporate limits of the town of Harrodsburg, that town being the county seat. The proviso is not that the road in passing through the county shall touch or pass through the town of Harrodsburg, but simply that it shall pass to or through that town, and either is sufficient. It seems not an unreasonable construction of this statute that the condition of subscription was fully complied with when the railroad was so completed from the northern line of the county to Harrodsburg, the county seat, that a train of cars passed over it. If that be the correct construction, then of course we need inquire no further; and, on the other hand, if though not correct, it be not an unreasonable construction, the court should, in view of the unquestioned good faith of both parties, of the fact that it was adopted by the authorities of the county, and that

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by reason thereof the company desisted from further work — accept, if possible, the interpretation placed by the parties as correct. This view is certainly persuasive.

But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a *bona fide* holder. It is said that the bonds were placed in escrow, and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

"It is generally agreed that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the *bona fide* transferee for value and before maturity." *Long Island Loan & Trust Co.* v. *Columbus &c. Railway*, 65 Fed. Rep. 455, 458.

In *Fearing* v. *Clark*, 16 Gray, 74, 76, Chief Justice Bigelow thus states the law:

"The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was entrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences, which follow from the negotia-

tion of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are entrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on the innocent holders who have taken it for value without notice."

In *Burson* v. *Huntington*, 21 Michigan, 415, 433, it is said: "If the maker or endorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, . . . and the person to whom it is thus entrusted violate the confidence reposed in him, and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a *bona fide* holder for value, and the maker or endorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder."

See also *Vallett* v. *Parker*, 6 Wend. 615, 620; *Chase National Bank* v. *Faurot*, 149 N.Y. 532; *Graff* v. *Logue*, 61 Iowa, 704.

Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as, transferred to a *bona fide* holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give "bond, with good surety, approved by the county judge, for the faithful performance" of his duty. If in case the condition was not performed the county had a perfect defence to the bonds, even in the hands of a *bona fide* holder, there were little need of requiring the trustee to give any security.

Another significant feature in this connection is the fact that by statute the bonds were to be negotiable. Counsel for the county suggest that this provision of the statute can be satisfied by giving to the bonds the benefit of negotiability as between successive holders, but we know of no reason why the general significance of the word "negotiable" should be

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so limited. The third of the three peculiar and distinguishing characteristics of negotiable instruments, as stated in 1 Daniel on Negotiable Instruments, sec. 1, is respecting the consideration, and the author says:

"As between immediate parties, the true state of the case may be shown and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a *bona fide* holder for value and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosesoever hands it may go."

To hold that by this provision the legislature intended that the quality of negotiability should inhere in the instruments only as between the successive holders, and not between the maker and any *bona fide* holder, cannot be justified by any reasonable construction of the language used.

It follows from these considerations that these bonds in the hands of the Life and Trust Company, a *bona fide* holder, must be adjudged the valid obligations of the county.

The judgment of the Court of Appeals is therefore reversed and the judgment of the Circuit Court is affirmed.